

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ava Ruha Corporation dba Mother's Market &
Kitchen,

Petitioner,

v.

Mother's Nutritional Center, Inc.,

Respondent.

Cancellation No. 92/056,067

Reg. No. 3,675,027

Mark: MOTHER'S NUTRITIONAL
CENTER

Registration Date: September 1, 2009

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

RESPONDENT'S MOTION TO DISMISS PETITION TO CANCEL PURSUANT TO
FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM

Respondent Mother's Nutritional Center, Inc. ("Respondent") hereby submits its Motion to Dismiss the Petition to Cancel (the "Motion") filed by petitioner Ava Ruha Corporation dba Mother's Market & Kitchen ("Petitioner").

I. INTRODUCTION

The Petition to Cancel ("Petition") filed by Petitioner fails to state a claim for relief, is rife with misrepresentations, is baseless and frivolous, and should be dismissed with prejudice. Most offensive, perhaps, is that Petitioner accuses Respondent of fraud for making the *same representations* that Petitioner itself made to the Trademark Office in prosecuting the application on which U.S. Reg. No. 1,440,871 (the "'871 Reg.") issued. Specifically, Petitioner argues here that Respondent's statement that Petitioner's services are limited to services "directed toward natural and health products and food preparations," was "false and tantamount to fraud." Petition, ¶¶ 9-10. In prosecuting the '871 Reg., however, Petitioner repeatedly took that *exact* position.



Less blatant, but still insulting, is Petitioner's distorted quotation of statements made by Respondent and the Examining Attorney during the prosecution of the application on which U.S. Reg. No. 3,675,027 (the " '027 Reg.") issued. *Three times* Petitioner edits quotations to indicate that the Examining Attorney or Respondent were referring to the '871 Reg. in their comments. ¶¶ 8,10-11. In fact, examination of the relevant documents, makes clear that neither the Examining Attorney nor Respondent were referring to the '871 Reg. as alleged by Petitioner. Also problematic is Petitioner's deliberate attempt expand the reach of the '871 Reg. to actual products, rather than the "restaurant and grocery services directed toward natural and health products and food preparations" actually claimed in the '871 Reg.

In addition, Petitioner utterly fails to satisfy its burden of alleging "sufficient factual matter . . . to state a claim to relief that is plausible on its face."¹ Petitioner appears to seek cancellation of the '027 Reg. on three grounds: (1) fraud on the trademark office; (2) dilution of a previously registered mark; and (3) likelihood of confusion with a previously registered mark. Petitioner fails to state a claim for cancellation on any of these grounds.

Neither of the alleged "misrepresentations" identified by Petitioner are false. Further, even if the representations were false (which they are not), there is zero possibility that the Examining Attorney reasonably relied on or was misled by these alleged "misrepresentations." Both alleged "misrepresentations" relate to the scope of services in Petitioner's '871 Reg., Both Respondent and the Examining Attorney *quoted Respondent's identification of services verbatim*. To the extent the Petition is based on alleged fraud on the Trademark Office, it must be dismissed with prejudice.

Further, Petitioner's claims for dilution and likelihood of conclusion must also be dismissed. In support of each, Petitioner makes only the most conclusory allegations. In both cases, Petitioner fails to allege facts in support of the elements of its cause of action. Petition, ¶¶

¹ *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 U.S.P.Q.2d 1780 (T.T.A.B. 2012), *quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotation marks omitted); *see also Corporacion Habanos SA v. Rodriguez*, 99 U.S.P.Q.2d 1873 (T.T.A.B. 2011) (relying on *Twombly* and *Iqbal*).

15, 17. In both cases, Petitioner's allegations fail to "raise a right to relief above the speculative level" and must be dismissed. *Twombly*, 550 U.S. at 556-57. To the extent the Petition is based on dilution and/or likelihood of conclusion, it must be dismissed with prejudice.

II. STATEMENT OF RELEVANT FACTS

A. Prosecution History of the '871 Reg.

In attempting to overcome the Trademark Office's refusal of the application on which the '871 Reg. eventually issued, Petitioner argued on numerous occasions that confusion was not likely between its applied for mark, and prior registered marks for "restaurant services", and particularly, Italian or pizza restaurants, because, *inter alia*, Petitioner's applied for services "are restricted to the preparation and serving of natural and health food products." Declaration of Jessica C. Bromall ("Bromall Decl."), ¶ 7, Exh. F, p. 61-62 (emphasis added).²

In appealing refusal of its application, Petitioner argued that its services were distinct from the prior registered marks for "restaurant services", and particularly, Italian food, because "[i]t is unlikely that a consumer of health food services would expect to find those services in a pizza parlor and that one seeking to order a pizza would seek out a health food store." *Id.* at ¶ 8, Exh. G, pp. 72-73.

Again, in its Reply Brief on Appeal, Petitioner argued that "a likelihood of confusion is believed to be less where, as here, Applicant's mark is used in a more limited area The Examining Attorney's argument that health foods include natural Italian foods seeks to equate pizzerias with health food stores, and thus is believed to ignore distinctions that are appreciated by ordinary consumers." *Id.* at ¶ 9, Exh. H, p. 86.

B. Prosecution History of Respondent's '027 Reg.

In January 2008, Respondent applied for registration of its mark for "retail grocery stores." Shortly thereafter, in March 2008, the Examining Attorney issued an Office Action refusing registration of Respondent's mark on the basis of likelihood of confusion with fifteen

² Respondent respectfully requests that the Board take judicial notice of the pertinent documents from the prosecution of the '871 Reg., Exhibits F-H to the Bromall Decl., and the arguments asserted by Petitioner therein.

prior registrations for various food products, and Petitioner's '871 Reg. for "restaurant and grocery services directed toward natural and health product and food preparations."

With respect to the '871 Reg., the Examining Attorney stated:

Likelihood of confusion is determined on the basis of the goods and services as they are identified in the application and the registration. Since the identification of the applicant's goods and/or services is very broad, it is presumed that the application encompasses all goods and/or services of the type described, *including those in the registrant's more specific identification*, that they will move in all normal channels of trade and that they are available to all potential consumers.

Id. at ¶ 2, Exh. A, p. 18.³ The Examining Attorney went on to state in the next paragraph, "with respect to all other cited registrations, the goods are common food items that would be sold in any grocery store, including Applicant's retail grocery stores." *Id.*

In September 2008, Respondent submitted arguments against the Examining Attorney's refusal. In response, Respondent amended its identification of services to make clear that its retail grocery stores were "providing groceries in connection with federally funded nutrition program for pregnant women, new mother's, and young children." *Id.* at ¶ 3, Exh. B, p. 25-26. Respondent then argued, in substance, that confusion was not likely because Petitioner's '871 Reg. was for "restaurant and grocery services directed to natural and health product and food preparations," while Respondent's applied for retail grocery services would be provided *exclusively* to members of the federally funded Women's, Infant, and Children Nutrition Program ("WIC"), which ensures that pregnant women, new mothers, and young children

³ Respondent notes that Petitioner did not provide page numbers on its Exhibits attached to its Petition. For the convenience of the Board and so that it can provide sufficiently specific citations, Respondent attaches to its Motion, copies of the relevant Exhibits bearing page numbers and annotated to direct the Board's attention to the relevant materials. See Declaration of Jessica C. Bromall, ¶¶ 2-4, Exhs. A-C.

received proper nutrition by providing checks that may be redeemed at authorized vendors. Petitioner, is not an authorized vendor. *Id.*

The Examining Attorney then asked Respondent to submit additional information about the WIC program, which Respondent did. *Id.* at ¶ 5, Exh. D, p. 53-54.⁴ In its response, Respondent noted that *none* of the various food products contained in the registrations cited by the Examining Attorney as bars to registration of Respondent's mark, were on the approved WIC food list, and therefore, none of those products were available for sale in Respondent's retail grocery stores. *Id.* at ¶ 4, Exh. C, p. 29. At that time, Respondent also amended its identification of services to clarify that its retail grocery stores *exclusively* served members of the WIC program, which Respondent did. *Id.* at p. 31; *see also id.* at ¶ 6, Exh. E, p. 57-58. The Examining Attorney apparently agreed with Respondent that Respondent's and Petitioner's services, as identified in the respective application and registration, were sufficiently distinct, serving entirely distinct groups of consumers, that confusion was not likely to occur, and allowed the '027 Reg.

III. FRAUD CLAIM MUST BE DISMISSED WITH PREJUDICE

To state a claim for fraud, the alleged fraud must be pleaded with sufficient particularity. *See* Fed. R. Civ. P. 9(b). Petitioner must allege specific facts which would, if proven, establish: (1) a false representation regarding a material fact; (2) that the person making the representation knew or should have known that the representation was false; (3) that the person intended to mislead the Trademark Office; and (4) that the Trademark Office reasonably relied on the misrepresentation. *See* Fed. R. Civ. P. 9(b); *Woodstock's Enterprises Inc. (California) v. Woodstock's Enterprises Inc. (Oregon)*, 43 U.S.P.Q.2d 1440, 1443 (T.T.A.B. 1997), *aff'd mem.*, 152 F.3d 942 (Fed. Cir. 1998). Petitioner does not satisfy these requirements.

A. No False Statements

Petitioner identifies fifteen alleged misrepresentations by Respondent:

⁴ Respondent respectfully requests that the Board take judicial notice of pertinent documents from the prosecution of the '027 Reg., copies of which are attached as Exhibits D and E to the Bromall Decl.

- Respondent stated that “the ‘871 Reg. for MOTHER’S MARKET & KITCHEN & DESIGN is issued in connection with ‘restaurant and grocery services directed toward natural and health product and food preparations.’ The ‘871 Reg. is limited on its face to ‘services directed toward natural and health products and food preparations.” (Petition, ¶¶ 9-10)
- Applicant notes that none of the cited registrants’ goods are on the WIC approved food list and therefore, that none of the cited registrants goods [including the MOTHER’S MARKET & KITCHEN] are available for purchase in Applicant’s stores. (Petitioner, ¶¶ 11-12)

Neither of these statements constitute misrepresentations.

1. **First Alleged** “Misrepresentation”

The first alleged “misrepresentation” -- that the grocery and restaurant services in the ‘871 Reg. are limited to “services directed towards natural and health products and food preparations” -- is, of course, a true statement. See ‘871 Reg. **In fact, Petitioner took the same position during the prosecution of the ‘871 Reg., repeatedly arguing and representing to the Trademark Office that its services were limited to** “natural and health products and food preparations.” Bromall Decl., Exh. F, p. 61-62, Exh. G, pp. 72-73, Exh. H, p. 87.

Notwithstanding the plain language of the ‘871 Reg., **and in direct contradiction of the position it took during prosecution of the ‘871 Reg.**, Petitioner now claims that its registration is not so limited. Petitioner’s position is baseless and frivolous. In this regard, Respondent notes that Mr. Kit M. Stetina represented Petitioner in connection with the *both* the prosecution of the ‘871 Reg. and the present cancellation action. See, e.g., *id.* at Exh. F, p. 65, Exh. G, p. 76; Petition, p. 6. It follows that both Petitioner and its counsel are well aware of the positions taken in connection with the prosecution of the ‘871 Reg.

Either Petitioner is making a misrepresentation to the Trademark Office now, or its was making a misrepresentation to the Trademark Office during the prosecution of the '871 Reg. If the former, perhaps Petitioner is attempting to gain leverage in this cancellation action by charging Respondent with fraud. If that is the case, sanctions in the form of dismissal of the entire Petition are appropriate. If the latter, it appears that Petitioner was attempting to mislead the Trademark Office regarding the true scope of its services during the prosecution of the '871 Reg., in order to obtain the '871 Reg. If that is the case, the '871 Reg. was procured by fraud and should be cancelled. Either way, Petitioner's Petition should be dismissed with prejudice.

2. Second Alleged Misrepresentation

The second alleged "misrepresentation" is not false either. In the alleged "misrepresentation," Respondent points out to the Examining Attorney that "none of the cited registrants' goods are on the WIC approved food list and therefore . . . are [not] available for purchase in Applicant's stores." *Id.* at ¶ 4, Exh. C, p. 29. In support of its claim, Petitioner doctors the quotation to imply that Respondent was referring not just to the fifteen cited registrations that actually contained goods, but also to the '871 Reg., which contains *only services*. Compare *id.* with Petition, ¶ 11-12.

Respondent was clearly referring to the fifteen cited registrations that actually contained *goods* and not to the '871 Reg., which is limited to services. Second, the fact that Petitioner carries certain products in its store that are on the WIC approved food list, does not render Respondent's statement false. It is black letter law that "likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration." *E.g.*, Bromall Decl., ¶ 2, Exh. A, p. 18 (citing numerous cases). Petitioner's '871 Reg. *has no goods*. Therefore, even if Respondent was referring to the '871 Reg., it is literally true that none of the goods therein are on the WIC approved food list or available in Respondent's stores.⁵

⁵ Respondent never claimed, as Petitioner suggests, that its grocery stores and Petitioner's grocery stores carry none of the same products. Instead, Respondent made an argument similar to that raised by Petitioner in prosecuting the '871 Reg., that consumers seeking out a grocery store that exclusively serves members of the federally funded WIC program, are not likely to "seek out" a health food store. Among other things, Petitioner's health food stores are *not* WIC authorized vendors, and do not (and cannot) accept WIC vouchers.

B. Zero Possibility that Examining Attorney Reasonably Relied on Alleged False Statements

An essential element of a claim for fraud on the Trademark Office is that the Trademark Office reasonably relied on an allegedly false statement of fact. *Woodstock's Enterprises Inc.*, 43 U.S.P.Q.2d at 1443. Here, even if the above alleged “misrepresentations” regarding the scope of the services in the ‘871 Reg. were actually false (which they are not), there is zero possibility that the Examining Attorney reasonably relied on or was misled by those statements.

The Examining Attorney had a copy of the ‘871 Reg. in its possession and was fully aware of the actual services claimed therein. Moreover, both the Examining Attorney and Respondent *quote the entirety* of the identification of services claimed in ‘871 Reg. *verbatim*. Bromall Decl., ¶ 2, Exh. A, p. 18; ¶ 3, Exh. B, p. 25. Any reliance on a statement characterizing the identification of services rather than the actual identification services in the ‘871 Reg. would be unreasonable *per se*.

C. No Intent to Deceive The Trademark Office

Finally, even if Respondent’s statements were false (they were not), and even if the Examining Attorney reasonably relied on or was misled those statements (she did/was not), there are no factual allegations that suggest that Registrant intended to mislead the Trademark Office.

Both alleged “misrepresentations,” were supposedly made to counter the Examining Attorney’s argument that “with respect to all the other cited registrations, the goods are common food items that would be sold in any grocery store, including Applicant’s retail grocery stores.” See Petition, ¶¶ 8-12. *Twice* Petitioner doctors the foregoing quotation from the Office Action to indicate that, in making this argument, the Examining Attorney was referring to Petitioner’s ‘871 Reg. *Id.* at ¶¶ 8, 10.

The Examining Attorney’s actual arguments were as follows. With respect to the ‘871 Reg., the Examining Attorney stated:

Since the identification of the applicant's goods and/or services is very broad, it is presumed that the application encompasses all goods and/or services of the type described, *including those in the registrant's more specific identification*, that they will move in all normal channels of trade and that they are available to all potential consumers.

Id. at ¶ 2, Exh. A, p. 18. In the very next paragraph, the Examining Attorney continued:

With respect to all of the cited registrations, the goods are common food items that would be sold in any grocery stores, including Applicant's retail grocery stores."

Id.

Thus, contrary to what Petitioner indicates with its doctored quotation, in noting that "the goods are common food items that would be sold in any grocery store," the Examining Attorney was explicitly referring to the fifteen cited registrations for various food products, and was explicitly *not* referring to Petitioner's '871 Reg.⁶ Petitioner's conclusory statement that Respondent intended to mislead the Examining Attorney to overcome this argument -- which had nothing to do with the '871 Reg. -- is nonsensical and is insufficient to allege intent as is required to state a claim for fraud.

IV. DILUTION CLAIM MUST BE DISMISSED WITH PREJUDICE

To state a claim for dilution, Petitioner was required to allege, *inter alia*, that its mark is famous and that such fame was acquired before Respondent began commercial use of its mark. *E.g., Toro Co. v. Torohead, Inc.*, 61 U.S.P.Q.2d 1164, 1173 (T.T.A.B. 2001), citing 15 U.S.C. §1125(c)(1). Petitioner fails to allege that its mark is famous, or that its mark was famous before Respondent began commercial use of its mark. Nor does Petitioner allege any facts from which

⁶ As noted above, the '871 Reg. does not include any goods, and instead, includes only services. Thus any argument or reference to goods in the '871 Reg. is nonsensical.

the Board could reasonably infer that its marks is famous and was famous before Respondent began using its mark.

Rather, in support of its claim, Petitioner makes only the conclusory allegation that “continued registration of the MOTHER’S NUTRITIONAL CENTER Mark by Respondent will dilute the strength of Petitioner’s MOTHER’S MARKET & KITCHEN mark.” Petition, ¶ 17. This conclusory allegation is insufficient to state a claim for dilution. To the extent the Petition is based on dilution, it must be dismissed with prejudice.

V. LIKELIHOOD OF CONFUSION CLAIM MUST BE DISMISSED WITH PREJUDICE

Petitioner also fails to adequately allege facts sufficient to state a claim for cancellation on grounds of likelihood of confusion. Rather, in support of its claim, Petitioner makes only the conclusory allegation that “Respondent’s MOTHER’S NUTRITIONAL CENTER mark is confusingly similar to Petitioner’s MOTHER’S MARKET & KITCHEN trademark and its registration and use by Respondent on the goods and/or services claimed in Respondent’s registration are likely to cause confusion, deception, and mistake.” Petition, ¶ 15. This conclusory allegation is insufficient to state a claim for relief. Among other things, Petitioner fails to identify the “goods and/or services” in Respondent’s registration. To the extent the Petition is based on an alleged likelihood of confusion, it must be dismissed with prejudice.

VI. ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

In the event the Board declines to take judicial notice of the various prosecution history documents and arguments as requested in footnotes 2 and 4, herein, Respondent submits that this Motion is suitable for resolution by summary judgment, and requests that the Board enter summary judgment in its favor.

VII. MOTION TO STRIKE

In the event the Board is not inclined to grant Respondent’s Motion, Respondent submits that the allegations set forth in ¶¶ 8-14 of the Petition are improper, and respectfully requests that the Court strike those allegations pursuant to Fed. R. Civ. P. 12(f). Pursuant to Fed. R. Civ. P.

12(f), the Board may order stricken from a pleading “any redundant, immaterial, impertinent, or scandalous matter.” *See* Fed. Rule. Civ. Proc. 12(f).

VIII. CONCLUSION

The Petition is frivolous and baseless and brought in bad faith, as demonstrated through Petitioner’s numerous misrepresentations, and Petitioner’s accusation of fraud based on Respondent’s taking the *same exact* position Petitioner itself took during prosecution of the ‘871 Reg. By so doing, Petitioner has already put Respondent to considerable expense to respond to its frivolous allegations. For all the reasons stated herein, Registrant respectfully requests that the Board dismiss the Petition with prejudice in its entirety and deny leave to amend.

Dated: October 1, 2012

Respectfully submitted,
/s/ JESSICA C. BROMALL
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Jessica C. Bromall, Esq.
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NUTRITIONAL CENTER, INC.

DECLARATION OF JESSICA C. BROMALL

I, JESSICA C. BROMALL, declare as follows:

1. I am an attorney licensed to practice law in the State of California and an associate at the law firm of Jeffer Mangels Butler & Mitchell LLP, counsel for respondent Mother's Nutritional Center, Inc. in the above-referenced matter. I have personal knowledge of the facts set forth herein, or knowledge based on the documents in my firm's files in the relevant matters, and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of Registrant's Motion to Dismiss Petition to Cancel Pursuant to Fed. R. Civ. P. 12(b)(6) For Failure to State a Claim (the "Motion").
2. Attached hereto as Exhibit A, is a true and correct copy of the relevant portions of the March 11, 2008 Office Action issued in connection with the prosecution of the application on which U.S. Reg. No. 3,675,027 (the "'027 Reg.") issued, which I downloaded from the United States Patent and Trademark Office's Trademark Status & Document Retrieval database ("TSDR"). A copy of the complete Office Action was attached as Exhibit 2 to the Petition for Cancellation.
3. Attached hereto as Exhibit B, is a true and correct copy of the relevant portions of the September 11, 2008 Response to Office Action filed by Respondent in connection with the prosecution of the application on which the '027 Reg. issued, which I downloaded from TSDR, and a copy of which was also attached as Exhibit 3 to the Petition for Cancellation.
4. Attached hereto as Exhibit C, is a true and correct copy of the April 15, 2009 Response to Office Action filed by Respondent in connection with the prosecution of the application on which the '027 Reg. issued, which I downloaded from TSDR, and a copy of which was also attached as Exhibit 4 to the Petition for Cancellation.
5. Attached hereto as Exhibit D, is a true and correct copy of the October 15, 2008 Office Action issued in connection with the prosecution of the application on which the '027 Reg. issued, which I downloaded from TSDR.

6. Attached hereto as Exhibit E, is a true and correct copy of an Examiner's Amendment of the application on which the '027 Reg. issued, dated May 7, 2009, which I downloaded from TSDR.

7. Attached hereto as Exhibit F, is a true and correct copy of the March 20, 1985, filed by Petitioner in connection with the prosecution of the application on which U.S. Reg. No. 1,440,871 (the " '871 Reg.") eventually issued, which I downloaded from TSDR

8. Attached hereto as Exhibit G, is a true and correct copy of the appeal brief filed by Petitioner on or about March 13, 1986, in connection with the prosecution of the application on which the '871 Reg. issued, which I downloaded from TSDR

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct, and that this Declaration is executed on October 1, 2012 at Los Angeles, California.

/S/ JESSICA C. BROMALL
JESSICA C. BROMALL



To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004
Sent: 3/11/2008 3:40:53 PM
Sent As: ECOM107@USPTO.GOV

Attachments: [Attachment - 1](#)
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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/340519

MARK: MOTHER'S

77340519

CORRESPONDENT ADDRESS:

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RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: MOTHER'S NUTRITIONAL
CENTER, INC.

**CORRESPONDENT'S REFERENCE/DOCKET
NO:**

66309-1004

CORRESPONDENT E-MAIL ADDRESS:

trademarkdocket@jmbm.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 3/11/2008

The assigned trademark examining attorney has reviewed the referenced application and has determined the following.

Search Results

Registration Refused – Registration of Confusingly Similar Mark Exists

Registration of the proposed mark is refused because of a likelihood of confusion with the marks in U.S. Registration Nos. 0552693, 0560717, 0581646 and others. Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.* See the enclosed registrations.

Principles Governing Section 2(d) Refusals

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and/or services, to cause confusion, mistake or to deceive the

potential consumer as to the source of the goods and/or services. TMEP §1207.01. The Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods and/or services. The overriding concern is to prevent buyer confusion as to the source of the goods and/or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (C.C.P.A. 1974).

The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and cases cited therein. See also *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984), wherein the Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and registrant has no chance to be heard (at least in the absence of a consent agreement, which applicant has not submitted in this case).

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

Applicant has applied to register the mark "MOTHER'S", with design. The registrants are using the mark "MOTHER'S", "MOTHER'S" with design, "MAMACITA'S", translated to "mother's", "MOTHER'S COOKIES SINCE 1941" and "MOTHER'S MARKET & KITCHEN, with design.

Comparison of the Marks

The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b).

Applicant's proposed mark "MOTHER'S" is confusingly similar to the registrants' marks because the marks of the respective parties share the common wording "MOTHER'S". Further, the term

“MOTHER’S” is either the sole term in the registrant’s marks, or the first term and thus creates the dominant commercial impression in all the cited marks.

As a general rule, consumers are more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). The single term “MOTHER’S” in applicant’s mark is either the single term of the registrants’ marks, or the first term of the registrants’ marks.

When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

The literal portions of both applicant’s mark and the registrants’ marks are identical or nearly identical in appearance, sound and meaning. The addition of the design element does not obviate the similarity between the marks in this case. *In re Shell Oil Company*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975); TMEP §1207.01(c)(ii).

Disclaimed matter is typically less significant or less dominant when comparing marks. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986). The registrant in U.S. Reg. Nos. 3287272 and 1440871 also contains descriptive material that has been disclaimed.

Finally, with respect to U.S. Reg. No. 2258873, the mark MAMACITA is translated as MOTHER’S. The English translation of the mark is identical to the applicant’s mark. According to the doctrine of foreign equivalents, an applicant may not register foreign words or terms if the English-language equivalent has been previously registered for related products or services and the consumer would be likely to translate the foreign word(s) into its English equivalent. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991); *In re American Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987); *In re Ithaca Industries, Inc.*, 230 USPQ 702 (TTAB 1986); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983); TMEP §1207.01(b)(vi).

Comparison of the Goods/Services

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *On-*

line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

With respect to U.S. Reg. No. 1440871, registrant is using the mark with restaurant and grocery services directed toward natural and health products and food preparations. Applicant's services are "retail grocery stores."

Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Since the identification of the applicant's goods and/or services is very broad, it is presumed that the application encompasses all goods and/or services of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers. TMEP §1207.01(a)(iii).

With respect to all of the other cited registrations, the goods are common food items that would be sold in any grocery store, including applicant's retail grocery stores. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981); TMEP §1207.01(a)(iii). There are no limitations as to trade channels or classes of purchasers with respect to the registrants' goods. Therefore, all are common items that would be sold in applicant's grocery stores.

Customers shopping in applicant's grocery store would encounter food items provided by the registrants bearing the MOTHER'S trademark. Confusion as to source is likely to occur because the customers would naturally assume that the goods comprised a group of items from a house brand emanating from applicant. The marks on the food items and applicant's mark would be identical. Therefore, confusion as to source would be inevitable.

Accordingly, since there is no overriding factor to distinguish applicant's mark from the marks already registered, registration must be refused because the average purchaser would be likely to conclude that applicant's goods/services and registrants' goods/services emanate from a common source of origin. Although the trademark examining attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration. If applicant chooses to respond to the refusal(s) to register, then applicant must also respond to the following requirement(s).

Requirements

Mark in Specimen Does Not Match Mark in Drawing

The mark depicted on the drawing disagrees with the mark on the specimen. In this case, the drawing displays the mark as comprised of the word "MOTHER'S" and design appearing with patterning, while the specimen shows the mark as solid letters and design without the patterning. The difference may be due simply to a poor quality drawing.

The mark shown on the drawing must be a substantially exact representation of the mark as used on or in connection with the goods and/or services, as shown by the specimen. 37 C.F.R. §2.51(a); *see* C.F.R. §2.72(a)(1).

Therefore, applicant must submit one of the following:

- (1) A new drawing of the mark that agrees with the mark on the specimen but does not materially alter the original mark; 37 C.F.R. §2.72(a); TMEP §§807.14 *et seq.*; or
- (2) A substitute specimen that shows use of the mark that appears on the drawing, and the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: **"The substitute specimen was in use in commerce at least as early as the filing date of the application."** 37 C.F.R. §2.59(a); TMEP §904.05. If submitting a specimen requires an amendment to the dates of use, applicant must also verify the amended dates. 37 C.F.R. §2.71(c).

The following is a sample declaration under 37 C.F.R. §2.20 with a supporting statement for a substitute specimen:

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting there from, declares *that the substitute specimen was in use in commerce at least as early as the filing date of the application*; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

(Signature)

(Print or Type Name and Position)

(Date)

If applicant cannot satisfy the above requirements, applicant may amend the Section 1(a) filing basis (use in commerce) to Section 1(b) (intent to use basis), for which no specimen is required. However, should applicant amend the basis to Section 1(b), registration cannot be granted until applicant later amends the application back to use in commerce by filing an acceptable allegation of use with a proper specimen. 15 U.S.C. §1051(c); 37 C.F.R. §§2.76, 2.88; TMEP Chapter 1100.

In order to amend to Section 1(b), applicant must submit the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: **“Applicant has had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the filing date of the application.”** 15 U.S.C. §1051(b); 37 C.F.R. §§2.34(a)(2), 2.35(b)(1); TMEP §806.01(b).

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney directly at the number below.

/bluken/
Bonnie Luken
Trademark Examining Attorney
Law Office 107
Phone (571)272 8807
Fax (571)273 9107

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office action should be filed using the form available at <http://www.uspto.gov/teas/eTEASpageD.htm>. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

Print: Mar 11, 2008

73472414

DESIGN MARK

Serial Number

73472414

Status

REGISTERED AND RENEWED

Word Mark

MOTHER'S MARKET & KITCHEN

Standard Character Mark

No

Registration Number

1440871

Date Registered

1987/05/26

Type of Mark

SERVICE MARK

Register

PRINCIPAL

Mark Drawing Code

(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner

AVA RUHA CORPORATION DBA MOTHER'S MARKET AND KITCHEN CORPORATION
CALIFORNIA 225 EAST 17TH STREET COSTA MESA CALIFORNIA 92627

Goods/Services

Class Status -- ACTIVE. IC 042. US 100 101. G & S: RESTAURANT AND
GROCERY SERVICES DIRECTED TOWARD NATURAL AND HEALTH PRODUCTS AND FOOD
PREPARATIONS. First Use: 1978/05/01. First Use In Commerce:
1978/05/01.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MARKET & KITCHEN"
APART FROM THE MARK AS SHOWN.

Filing Date

1984/03/26

Examining Attorney

MARKS, MARTIN H.

Attorney of Record

KIT M. STETINA



Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77340519
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (current)	
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	MOTHER'S
COLOR(S) CLAIMED (If applicable)	Color is not claimed as a feature of the mark.
DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the word "Mother's".
MARK SECTION (proposed)	
MARK FILE NAME	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0002.JPG
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	MOTHER'S
COLOR MARK	YES
COLOR(S) CLAIMED (If applicable)	The color(s) Color is not claimed as a feature of the mark. is/are claimed as a feature of the mark.
DESCRIPTION OF THE MARK (and Color Location, if applicable)	The mark consists of the word "Mother's".
PIXEL COUNT ACCEPTABLE	YES
PIXEL COUNT	916 x 250

ARGUMENT(S)

The Examining Attorney has refused registration of Applicant's mark MOTHER'S on the basis that Applicant's mark, when used in connection with the identified goods and services, so resembles the following registered marks as to be likely to cause confusion, mistake, or deception pursuant to Trademark Act Section 2(d):

(A) Registrations for MOTHER'S and MOTHER'S & Design, for use in connection with various food products (collectively the "MOTHER'S Food Registrations"):

(1) In the name of Mother's Food Products, Inc.: Reg. No. 552,693, Reg. No. 560,717, Reg. No. 581,646, Reg. No. 589,652, Reg. No. 617,961, Reg. No. 739,469, Reg. No. 867,634, and Reg. No. 1,422,150;

(2) In the name of Quaker Oats Company: Reg. No. 1,584,991 and Reg. No. 2,226,184;

(3) In the name of Kellogg North America Company: Reg. No. 1,065,521; and

(4) In the name of Mother's Cake & Cookie Co.: Reg. No. 3,287,272, Reg. No. 3,287,270, Reg. No. 862,099, Reg. No. 862,100, all for use in connection with cookies;

(B) Reg. No. 2,258,873 for MAMACITA in the name of Casa de Oro Foods LLC for use in connection with tortillas (the " '873 Reg").

(C) Reg. No. 1,440,871 for MOTHER'S MARKET & KITCHEN & Design in the name of Ava Ruhn Corporation dba Mother's Market and Kitchen for use in connection with restaurant and grocery store services directed toward natural and health products and food preparations (the " '871 Reg.")

For the reasons set forth below, Applicant respectfully disagrees with the Examining Attorney's position and requests that the refusal be withdrawn and Applicant's Mark be allowed to proceed to publication.

(A) Confusion is Not Likely Between Applicant's Mark and the MOTHER'S Food Registrations

The Examining Attorney argues that confusion is likely to arise because consumers will believe that, upon seeing products in grocery stores bearing the marks in the MOTHER'S Food Registrations, consumer will believe that those products originate from Applicant. However, although, the goods identified in the MOTHER'S Food Registrations may be found in grocery stores, it does not follow that consumers will believe that those goods originate from Applicant. See In re Sentry Drug Center, Inc., 177 U.S.P.Q. 208, 209 (T.T.A.B. 1973).

In In re Sentry Drug Center, Inc., the Examining Attorney refused registration for SENTRY DRUG CENTERS ("drug centers" disclaimed) because of a likelihood of confusion with "existing registrations of the word 'SENTRY' to different parties for an oral antiseptic mouthwash and for vitamins-dietary supplement." See id. There, as here, the examining attorney reasoned that "mouthwashes and vitamin supplements are goods which are commonly sold in drug stores and that applicant has appropriated the dominant element of the registered marks for a retail drug store service." Id.

The applicant, in turn, noted that there were numerous registrations for SENTRY in connection with items that may be sold in an average drug store and argued, *inter alia*, that there is a distinction between retail drug store services and drugs or pharmaceuticals. See id. Just as there is a distinction between drug store services and drug or pharmaceuticals, there is a distinction between grocery store services and groceries.

Further, here, as in In re Sentry Drug Center, Inc., there are numerous registered marks incorporating the term MOTHER'S and used in connection with goods that are commonly sold in grocery stores. In Classes 29 and 30 alone, there are more than 80 registered marks that contain the element "MOTHER" or "MOTHER'S." The Examining Attorney has identified no less than 15 such registrations for the term MOTHER'S in the name of at least four different registrants. Many of these registrations, including each of the registrations identified by the Examining Attorney, are issued for use in connection with food items commonly found in grocery stores.

In In re Sentry Drug Centers, Inc., the TTAB agreed with applicant that there is an important distinction between the provision of store services and the products stocked in the store, and reversed the examining attorney's refusal to register the mark. See id. Applicant submits, that here, as in In re Sentry Drug Center, Inc., a refusal on the grounds of likelihood of confusion with the MOTHER'S Food Registrations, is not appropriate.

(B) Confusion is Not Likely Between Applicant's Mark and the '873 Reg.

Applicant's mark is MOTHER'S and the mark in the '873 Reg. is MAMACITA. There are visual and phonetic distinctions between these two marks. Because of the distinctions between Applicant's mark and the mark MAMACITA in the '873 Reg., Applicant's arguments in Section A above apply with even greater force to the '873 Reg. For all of those reasons, and because of the distinctions between Applicant's mark and the mark in the '873 Reg., a refusal on the grounds of likelihood of confusion based on the '873 Reg. is not appropriate.

(C) Confusion is Not Likely Between Applicant's Mark the '871 Reg.

The '871 Reg. for MOTHER'S MARKET & KITCHEN & Design is issued in connection with "restaurant and grocery services directed toward natural and health products and food preparations." The 871 Reg. is limited on its face to "services directed toward natural and health products and food preparations."

Applicant has amended its identification of services to read "retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children." As reflected in its amended identification of goods and services, Applicant is the owner of a chain of groceries stores dedicated exclusively to women, infants, and children under the federally funded Women's, Infant, and Children ("WIC") program. WIC helps to ensure that pregnant women, infants, and children under five receive proper nutrition by providing checks that may be redeemed at authorized vendors for the purchase certain food items. A copy of the authorized food list is attached hereto as Exhibit "A."

Both Applicant and registrant provide specialized services. Natural and health food stores are specialized, offering health food, organic foods, local produce, and often nutritional supplements. Applicant is also very specialized, providing services only to those women and children in the WIC program and providing only those goods on the WIC authorized food list.

Due to the specialization of both Applicant and registrant, it is unlikely that any confusion will arise between Applicant's WIC grocery stores and registrant's health food store, and a refusal on the grounds of likelihood of confusion is not appropriate.

Concluding Remarks

Applicant has presented arguments demonstrating that there is no likelihood of confusion between Applicant's mark and the marks cited by the Examining Attorney. Accordingly, it is respectfully requested that the Section 2(d) refusal be withdrawn and the application be allowed to proceed to publication.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)

ORIGINAL PDF FILE	evi_6310711710-193925083 . Exh. A - WIC Food List.pdf
CONVERTED PDF FILE(S) (15 pages)	\\TICRS\EXPORT3\IMAGEOUT3\773\405\77340519\xml1\ROA0003.JPG
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DESCRIPTION OF EVIDENCE FILE	a copy of the WIC approved foods list

GOODS AND/OR SERVICES SECTION (current)

INTERNATIONAL CLASS	035
DESCRIPTION	Retail grocery stores
FILING BASIS	Section 1(a)
FIRST USE	At least as early as 05/09/2007

ANYWHERE DATE	
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
SIGNATURE SECTION	
DECLARATION SIGNATURE	The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the <i>Trademark Rules of Practice</i> .
RESPONSE SIGNATURE	/jessica c. bromall/
SIGNATORY'S NAME	Jessica C. Bromall
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	09/11/2008
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Sep 11 19:58:38 EDT 2008
TEAS STAMP	USPTO/ROA-63.107.117.10-2 0080911195838327607-77340 519-430fadfb7c2ce06b48db e8948179779e32-N/A-N/A-20 080911193925083108

Response to Office Action
To the Commissioner for Trademarks:



Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77340519
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (no change)	
ARGUMENT(S)	
<p>The Examining Attorney has requested that the Applicant provide further information regarding its goods and services, specifically, information describing the services, how they are rendered, their salient features, and their prospective customers and channels of trade.</p> <p>Applicant provides the following information in response: Applicant uses the applied-for mark in connection with its chain of grocery stores, all of which are dedicated exclusively to providing WIC approved groceries to participants in the federally funded WIC program. WIC is a federally-funded health and nutrition program directed to ensuring that pregnant women, infants, and children under five receive proper nutrition. Participants in the WIC program receive vouchers that may be redeemed at authorized vendors for the purchase of certain pre-approved food items. Some such vendors are full purpose grocery stores where both WIC approved foods, as well as other goods, are available for purchase. Applicant's stores, however, exclusively stock and offer for sale items on the WIC approved foods list.</p> <p>A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants' goods are available for purchase in Applicant's stores.</p> <p>In addition to the WIC approved food list, Applicant provides sample advertisements describing the nature of its services.</p> <p>Applicant has also amended its identification of goods and services to make clear that its services are provided exclusively in connection with the WIC program.</p> <p>Accordingly, Applicant submits that its application is now in proper condition for publication and respectfully requests such action.</p>	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
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CONVERTED PDF FILE(S) (15 pages)	<u>\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0002.JPG</u>
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ORIGINAL PDF FILE	<u>evi_6310711720-170958826 . Advertisement.pdf</u>
CONVERTED PDF FILE(S) (1 page)	<u>\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0018.JPG</u>
ORIGINAL PDF FILE	<u>evi_6310711720-170958826 . Brochure.pdf</u>
CONVERTED PDF FILE(S) (1 page)	<u>\\TICRS\EXPORT6\IMAGEOUT6\773\405\77340519\xml1\ROA0019.JPG</u>
DESCRIPTION OF EVIDENCE FILE	the WIC approved foods list, and a flyer, advertisement, and brochure describing Applicant's services
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Retail grocery stores providing groceries in connection with federally funded nutrition program for	

pregnant women, new mothers, and young children

FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	035
TRACKED TEXT DESCRIPTION	

Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children; Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.

FINAL DESCRIPTION

Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.

FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 05/09/2007
FIRST USE IN COMMERCE DATE	At least as early as 05/09/2007
SIGNATURE SECTION	
DECLARATION SIGNATURE	The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the <i>Trademark Rules of Practice</i> .
RESPONSE SIGNATURE	/jessica c. bromall/
SIGNATORY'S NAME	Jessica C. Bromall
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	04/15/2009
AUTHORIZED SIGNATORY	YES

FILING INFORMATION SECTION

SUBMIT DATE	Wed Apr 15 17:12:54 EDT 2009
TEAS STAMP	USPTO/ROA-63.107.117.20-2 0090415171254689913-77340 519-4303a2293bc83347c3301 7e7cf4e7cd6cd-N/A-N/A-200

**Response to Office Action
To the Commissioner for Trademarks:**

Application serial no. **77340519** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney has requested that the Applicant provide further information regarding its goods and services, specifically, information describing the services, how they are rendered, their salient features, and their prospective customers and channels of trade.

Applicant provides the following information in response: Applicant uses the applied-for mark in connection with its chain of grocery stores, all of which are dedicated exclusively to providing WIC approved groceries to participants in the federally funded WIC program. WIC is a federally-funded health and nutrition program directed to ensuring that pregnant women, infants, and children under five receive proper nutrition. Participants in the WIC program receive vouchers that may be redeemed at authorized vendors for the purchase of certain pre-approved food items. Some such vendors are full purpose grocery stores where both WIC approved foods, as well as other goods, are available for purchase. Applicant's stores, however, exclusively stock and offer for sale items on the WIC approved foods list.

A copy of the WIC approved food list is attached hereto. In this regard, Applicant notes that none of the cited registrants' goods are on the WIC approved food list and, therefore, that none of the cited registrants' goods are available for purchase in Applicant's stores.

In addition to the WIC approved food list, Applicant provides sample advertisements describing the nature of its services.

Applicant has also amended its identification of goods and services to make clear that its services are provided exclusively in connection with the WIC program.

Accordingly, Applicant submits that its application is now in proper condition for publication and respectfully requests such action.

EVIDENCE

Evidence in the nature of the WIC approved foods list, and a flyer, advertisement, and brochure describing Applicant's services has been attached.

Original PDF file:

evi 6310711720-170958826 . WIC Food List.pdf

Converted PDF file(s) (15 pages)

Evidence-1

Evidence-2

Evidence-3

Evidence-4

Evidence-5

Evidence-6

Evidence-7

Evidence-8

Evidence-9

Evidence-10

Evidence-11

Evidence-12

Evidence-13

Evidence-14

Evidence-15

Original PDF file:

evi 6310711720-170958826 . Flyer.pdf

Converted PDF file(s) (1 page)

Evidence-1

Original PDF file:

evi 6310711720-170958826 . Advertisement.pdf

Converted PDF file(s) (1 page)

Evidence-1

Original PDF file:

evi 6310711720-170958826 . Brochure.pdf

Converted PDF file(s) (1 page)

Evidence-1

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children

Original Filing Basis:

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

Proposed:

Tracked Text Description: ~~Retail grocery stores providing groceries in connection with federally funded nutrition program for pregnant women, new mothers, and young children;~~ Retail grocery stores that exclusively provide groceries in connection with a federally funded nutrition program for pregnant women, new mothers, and young children.

Class 035 for Retail grocery stores that exclusively provide groceries in connection with a federally

funded nutrition program for pregnant women, new mothers, and young children.

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 05/09/2007 and first used in commerce at least as early as 05/09/2007, and is now in use in such commerce.

SIGNATURE(S)

Declaration Signature

I hereby elect to bypass the submission of a signed declaration, because I believe a declaration is not required by the rules of practice. I understand that the examining attorney could still, upon later review, require a signed declaration.

Response Signature

Signature: /jessica c. bromall/ Date: 04/15/2009

Signatory's Name: Jessica C. Bromall

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 77340519

Internet Transmission Date: Wed Apr 15 17:12:54 EDT 2009

TEAS Stamp: USPTO/ROA-63.107.117.20-2009041517125468

9913-77340519-4303a2293bc83347c33017e7cf

4e7cd6cd-N/A-N/A-20090415170958826722

California WIC Authorized Food List

(WAFL, August 2008)



California WIC Authorized Food List
August 2008

Breastfeeding Women	
<p>Carrots</p> <p><i>Can buy</i></p> <p>Any brand Pre-packaged only</p> <ul style="list-style-type: none"> • Fresh, large, whole 	<p><i>Cannot buy</i></p> <ul style="list-style-type: none"> • Canned, shredded, frozen, or baby carrots • Bulk (not packaged)
<p>Tuna</p> <p><i>Can buy</i></p> <p>Any brand 5 oz. or 6 oz. cans</p> <ul style="list-style-type: none"> • Chunk light water-packed • Dietetic tuna • Low-sodium tuna 	<p><i>Cannot buy</i></p> <ul style="list-style-type: none"> • Solid white or Albacore tuna • Tuna with soy protein added • Oil-packed tuna • Prime fillet

Ways to Buy up to 36 oz. of Cereal

- 12 oz. + 12 oz. + 12 oz. = 36 oz.
- 20 oz. + 15 oz. = 35 oz.
- 17.3 oz. + 17.3 oz. = 34.6 oz.
- 17.5 oz. + 17.3 oz. = 34.8 oz.
- 17.5 oz. + 17.5 oz. = 35 oz.
- 18 oz. + 18 oz. = 36 oz.
- 14.5 oz. + 19 oz. = 33.5 oz.
- 20 oz. + 14 oz. = 34 oz.
- 21.5 oz. + 13 oz. = 34.5 oz.
- 20.4 oz. + 12 oz. = 32.4 oz.

California WIC Authorized Food List
August 2008

Cereals for Women	
<p>Can buy</p> <p>Any cereal specified on the food instrument</p> <p>Box or bags – 12 oz. package or larger except for store brand Instant Oatmeal which may be an 11.8 or 12 oz. box</p> <ul style="list-style-type: none"> • General Mills <ul style="list-style-type: none"> - Cheerios (plain) • Kellogg's <ul style="list-style-type: none"> - Corn Flakes (plain) - Frosted or Unfrosted Mini-Wheats (Big Bite or Bite Size) • Malt-o-Meal <ul style="list-style-type: none"> - Malt-O-Meal Original (plain) • Post <ul style="list-style-type: none"> - Honey Bunches of Oats (Honey Roast) - Premium Bran Flakes • Quaker <ul style="list-style-type: none"> - Life (plain) - Oatmeal Squares (blue box) • Store Brands (See list of authorized labels) <ul style="list-style-type: none"> - Crisp(y) Rice - Instant Oatmeal (Regular unflavored, in 11.8 oz. or 12 oz. box of individual serving packets) 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods • Individual serving packets, except for store brand Instant Oatmeal • Packages smaller than 12 oz., except for store brand Instant Oatmeal • Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored • Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Cereals for Children	
<p>Can buy</p> <p>Any cereal specified on the food instrument Box or bags – 12 oz. package or larger except for brand Instant Oatmeal which may be an 11.8 or 12 oz. box</p> <ul style="list-style-type: none"> • General Mills <ul style="list-style-type: none"> - Cheerios (plain) - Kix (plain) • Kellogg's <ul style="list-style-type: none"> - Corn Flakes (plain) - Frosted or Unfrosted Mini-Wheats (Big Bite or Bite Size) • B&G Foods <ul style="list-style-type: none"> - Cream of Wheat (1 minute, 2-1/2 Minute, 10 minute) • Post <ul style="list-style-type: none"> - Honey Bunches of Oats (Honey Roast) • Quaker <ul style="list-style-type: none"> - Life (plain) - Crunchy Corn Bran • Store Brands (See list of authorized labels) <ul style="list-style-type: none"> - Crisp(y) Rice - Instant Oatmeal (Regular unflavored, in 11.8 oz or 12 oz. box of individual serving packets) 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods • Individual serving packets, except for store brand Instant Oatmeal • Packages smaller than 12 oz., except for store brand Instant Oatmeal • Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored • Cereals with chocolate, fruit, nuts, marshmallows, or yogurt pieces/clusters

California WIC Authorized Food List
August 2008

Store Brand Cereals	
<p>Can buy</p> <p>Crisp(y) Rice box or bags 12 oz. packages or larger</p> <ul style="list-style-type: none"> • Albertsons • American Fare • Best Yet • Flavorite • Great Value • Home & Garden • Hospitality • Hy Top • IGA • Kroger • Parade • Raleys • Ralphs • Ralston (Military Commissary) • Red & White • Safeway • Special Value • Springfield • Stater Brothers • Sunny Select • Vons • Western Family <p>Instant Oatmeal – Regular plain, unflavored 11.8 oz. or 12 oz. box of individual serving packets</p> <ul style="list-style-type: none"> • Albertsons • Best Yet • Flavorite • Hy Top • IGA • Kroger • Parade • Raleys • Ralphs • Ralston (Military Commissary) • Red & White • Safeway • Special Value • Springfield • Stater Brothers • Sunny Select • Vons • Western Family 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Brands or labels not specifically listed on WIC Authorized Food List and California Shopping Guide WIC Authorized Foods • Individual serving packets, except for store brand Instant Oatmeal • Packages smaller than 12 oz., except for store brand Instant Oatmeal • Honey (except for Honey Bunches of Oats, Honey Roast), frosted, cinnamon, or fruit flavored • Cereals with chocolate, fruit, nuts, marshmallows, or yogurt clusters/pieces

California WIC Authorized Food List
August 2008

Juice – Frozen Concentrate	
<p>Can buy</p> <p>Any brand 11.5 oz. or 12 oz. containers</p> <ul style="list-style-type: none"> • Apple • Red Grape • Purple Grape • White Grape • Pineapple <ul style="list-style-type: none"> - Must state "100% Juice" <u>and</u> "120% Vitamin C" on the front label - Added calcium if the FI does <u>not</u> state: "No added calcium allowed" <p>Can buy</p> <p>Any brand 11.5 oz. or 12 oz. containers</p> <ul style="list-style-type: none"> • Orange juice <ul style="list-style-type: none"> - Must state "100% Juice" on the front label - Added calcium if the FI does <u>not</u> state: "No added calcium allowed" 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Other flavors, types, or sizes • Apple, Grape (red, purple, white), or Pineapple juice that does not state "100% Juice" <u>and</u> "120% Vitamin C" on the front label • Orange juice that does not state 100% juice on the front label • Added calcium if the FI states: "No added calcium allowed" • Juices with the following added ingredients: <ul style="list-style-type: none"> - Caffeine - Carnitine - Chromium - Ginkgo Biloba - Ginseng - Grape seed extract - Guarana - St. John's Wort - Taurine - Wheatgrass

California WIC Authorized Food List
August 2008

Juice - Bottled	
<p>Can buy</p> <p>Any brand of ready-to-drink 64 oz. containers</p> <ul style="list-style-type: none"> • Apple • Red Grape • Purple Grape • White Grape • Pineapple • Vegetable Cocktail -Low sodium allowed • Must state "100% Juice" <u>and</u> "120% Vitamin C" on the front label • Added calcium if the FI does <u>not</u> state: "No added calcium allowed" 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Other flavors, types, or sizes • Apple, Grape (red, purple, white), or Pineapple juice, or Vegetable Cocktail that does not state "100% Juice" <u>and</u> "120% Vitamin C" on the front label • Added calcium if the FI states: "No added calcium allowed" • Juices with the following added ingredients: <ul style="list-style-type: none"> - Caffeine - Carnitine - Chromium - Ginkgo Biloba - Ginseng - Grape seed extract - Guarana - St. John's Wort - Taurine - Wheatgrass

California WIC Authorized Food List
August 2008

Infant Formula	
MUST BUY THE NUMBER OF CANS OF FORMULA PRINTED ON THE FOOD INSTRUMENT (FI)	
<p>Can Buy</p> <p>Infant Formula specified on FI Can size and quantity specified on the FI</p> <ul style="list-style-type: none"> • Enfamil LIPIL with Iron 13 fl. oz. liquid concentrate or 12.9 oz. powder • Enfamil ProSobee LIPIL 13 fl. oz. liquid concentrate or 12.9 oz. powder • Enfamil LactoFree LIPIL 13 fl. oz. liquid concentrate or 12.9 oz. powder • Enfamil Gentlease LIPIL 12 oz. powder only • Enfamil A.R. LIPIL 12.9 oz. powder only • Other formula allowed ONLY if it is printed on the WIC FI. (For example: Nutramigen LIPIL; Similac NeoSure; Enfamil Enfacare LIPIL; Alimentum; PediaSure, vanilla flavor only.) 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Any other brand, type, or size not printed on the FI • Low iron infant formula or formula with no iron

California WIC Authorized Food List
August 2008

Infant Cereal	
MUST BUY THE NUMBER OF BOXES OF CEREAL PRINTED ON THE FOOD INSTRUMENT (FI)	
Can buy Gerber Infant Cereal only 8 oz. boxes <ul style="list-style-type: none">• Dry pack cereal with iron• May buy any combination of allowed cereals:<ul style="list-style-type: none">- Barley- Rice- Oatmeal- Mixed	Cannot buy <ul style="list-style-type: none">• Other types, brands, flavors or sizes of infant cereal• Infant cereal with added fruit• Single servings cups• 6 oz. variety packages

California WIC Authorized Food List
August 2008

Milk	
<p>Can buy</p> <p>Any brand Container size determined by type of milk purchased</p> <ul style="list-style-type: none"> • Pasteurized fluid cow's milk <ul style="list-style-type: none"> - Nonfat (fat free, skim) - 1% Lowfat (light) - 2% Reduced fat - Whole - Single gallons or gallon twin pack (For "1 ½ gallon" FI, must buy one full gallon and one ½ gallon) • Lactose free cow's milk <ul style="list-style-type: none"> - If specified for purchase on the FI - 1/2 gallon container • Acidophilus milk <ul style="list-style-type: none"> - If specified for purchase on the FI - 1/2 gallon container • Evaporated milk <ul style="list-style-type: none"> - 12 oz. can • Powdered dry milk <ul style="list-style-type: none"> - Nonfat or Lowfat only - 9.6 oz. to 25.6 oz. box 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Raw (unpasteurized) milk • Non-dairy substitutes • UHT milk (shelf-stable) • Quart or pint sizes • Evaporated "filled" milk • Sweetened condensed milk • Soy beverage (soy milk) • Buttermilk • Goat's milk • Organic milk • Chocolate milk • Flavored milk

California WIC Authorized Food List
August 2008

Eggs	
Can buy Any brand Dozen size carton <ul style="list-style-type: none">• Grade AA white chicken eggs• Small, medium, or large eggs	Cannot buy <ul style="list-style-type: none">• Other grades of eggs• Jumbo or extra large eggs• Low cholesterol eggs• Powdered or liquid eggs• Specialty eggs such as: cage free, stress free, vitamin enriched, organic, or Egglands best• Brown eggs• Egg substitutes• Ungraded eggs• Vitamin enriched

California WIC Authorized Food List
August 2008

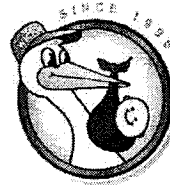
Cheese	
<p>Can buy</p> <p>Any brand Block or round ¾ pound (12 oz.) or larger</p> <ul style="list-style-type: none"> • Regular, reduced fat, nonfat or low sodium • Natural Cheddar cheese (mild, medium, sharp, extra sharp, or white) • Jack cheese • Mozzarella cheese • Process American cheese • Domestic cheese ONLY • Kosher cheese varieties are OK <p>At the deli:</p> <ul style="list-style-type: none"> • Can get block cheese sliced if no extra charge • Can buy cheese from a manufacturer's pre-sliced block in deli 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Marbled cheese • Process cheese food • Cream cheese or Parmesan cheese • Cheese spreads or cheese products <ul style="list-style-type: none"> - Velveeta • Cheese with added hot peppers or spices • Any other variety of cheese, such as Colby or Muenster • Cheese made outside the USA • Organic cheese • Pre-packaged sliced cheese, individual slices wrapped or not • String cheese • Diced, grated, or shredded cheese

California WIC Authorized Food List
August 2008

Peanut Butter	
Can buy Any brand Most FIs allow 16 oz. to 18 oz. jars Some FIs may allow 12 or 24 oz. jars <ul style="list-style-type: none">• Plain, creamy, chunky, or super chunky styles• Honey nut roasted• Low sodium• Low sugar or natural• Any commercial brand	Cannot buy <ul style="list-style-type: none">• Any other size container• "Grind your own"• Peanut butter spread• Organic peanut butter• Lowfat• Reduced fat• Peanut butter with added jams, jellies, chocolate, or honey

California WIC Authorized Food List
August 2008

Peas, Beans, or Lentils	
<p>Can buy</p> <p>Any brand, any variety Pre-sealed packaged or in bulk</p> <ul style="list-style-type: none"> • Uncooked dry beans, peas, and lentils • Plain, mixed beans, peas, and/or lentils <p>ONLY if printed on FI</p> <ul style="list-style-type: none"> • 14-16 oz. plain canned beans (any variety) • Canned baked beans (plain, vegetarian, with pork, with bacon) • Canned black-eye peas or chickpeas 	<p>Cannot buy</p> <ul style="list-style-type: none"> • Organic beans • Green or wax beans • Canned green peas • Frozen beans, peas, or lentils • Canned baked beans with beef or franks • Canned refried, Cajun style, Bar-B-Que, or Ranch style beans • Bean soup mixes with flavoring packets or spices



Mother's
NUTRITIONAL CENTER

Mother's Nutritional Center is a group of redemption centers that exclusively serve participants of the women, children and infant voucher program.

Summary of Operations

With over 50 locations, Mother's Nutritional Center is Southern California's largest women, children and infants redemption center.

The women, children and infants voucher program is a state health and food assistance program, offering its participants nutritional education and supplemental foods.

Vouchers are issued by the Department of Health Services and can be redeemed at Mother's Nutritional Center to buy health foods such as milk, juice, eggs, cheese, cereal, dry beans and peas and peanut butter. All customers must qualify at a local state office.

Mother's Nutritional Center serves participants of the program. We carry all food products included in the program.

Community Service

Mother's Nutritional Center is committed to giving back to the community. Throughout each year, Mother's donates and gives support to many organizations such as schools, community youth centers, food banks, and The Boys and Girls Club of America to name just a few. We also sponsor and participate in health fairs and countless other community events.

For more information, call:

1.888.MOTHERS

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(951) 682-1008

San Diego County

- **NATIONAL CITY**
924 Highland Ave.
(619) 477-9904
- **SAN DIEGO**
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(619) 264-4411



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9. Professionally Trained Staff
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LOCATIONS

Los Angeles County

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BELLFLOWER
17610 Bellflower Blvd.
(562) 804-0093

COVINA
1044 N. Citrus Ave.
(909) 966-4224

CUDAHT
7503 Atlantic Blvd.
(562) 560-2918

DOWNEY
11840 Lakewood Blvd.
(562) 822-8435

DUARTE
1325 E. Huntington Dr.
(626) 799-7004

EL MONTE
10016 E. Garvey Ave.
(626) 379-3507

HAWAIIAN GARDENS
22227 Norwalk Blvd.
(562) 421-3601

HUNTINGTON PARK
2919 E. Florence Ave.
(323) 381-1406

HUNTINGTON PARK
7026 Rugby Ave.
(323) 381-1406

LAWDALE
13625 S. Hawthorne
(310) 263-7212

LONG BEACH
13119 Long Beach Blvd.
(562) 218-5157

LOS ANGELES
4222 W. Beverly Blvd.
(213) 487-7447

LOS ANGELES
4333 S. Central Ave.
(323) 234-0448

LOS ANGELES
3665 Crenshaw Blvd.
(323) 296-5579

LOS ANGELES
1691 N. Eastern Ave.
(323) 268-0080

LOS ANGELES
2120 W. Eighth St.
(213) 736-5500

LOS ANGELES
4311 N. Figueroa St.
(323) 225-5025

LOS ANGELES
6512 N. Figueroa St.
(323) 258-5048

LOS ANGELES
4110 S. Figueroa St.
(323) 233-0500

LOS ANGELES
2136 E. First St.
(323) 980-5135

LOS ANGELES
423 E. Florence Ave.
(323) 971-6670

LOS ANGELES
1350 E. Florence Ave.
(323) 386-2880

LOS ANGELES
750 W. Imperial Hwy.
(323) 418-8555

LOS ANGELES
6224 Vermont Ave.
(323) 732-5700

LOS ANGELES
3853 Western Ave.
(323) 285-4079

LOS ANGELES
4065 Whittier Blvd.
(323) 263-8632

LYNWOOD
3737 Martin Luther King Jr. Blvd.
(310) 637-7885

MAYWOOD
3820 Shannon Ave.
(562) 584-6006

MONTEBELLO
2381 W. Whittier Blvd.
(323) 887-3522

NORWALK
13027 San Antonio Ave.
(562) 929-1960

PARAMOUNT
16000 Paramount Blvd.
(909) 634-1461

PICO RIVERA
8678 E. Whittier Blvd.
(562) 944-1022

POMONA
1805 Indian Hill Blvd.
(909) 445-0033

RESEDA
18353 Sherman Way
(818) 881-8717

SOUTH GATE
8430 State St.
(323) 584-5553

SOUTH GATE
3061 Tweedy Blvd.
(323) 565-7797

SOUTH GATE
3848 Tweedy Blvd.
(323) 560-4720

VAN NUYS
7100 Van Nuys Blvd.
(818) 785-1364

Orange County

ORANGE
18551 E. Chapman Ave.
(714) 332-3414

SANTA ANA
5015 W. Edinger Ave.
(714) 775-4178

San Bernardino County

FONTANA
9745 Sierra Ave.
(909) 822-3831

ONTARIO
1535 N. Baker
(909) 931-1060

ONTARIO
320 W. "C" St.
(909) 933-5212

ONTARIO
806 S. Mountain Ave.
(909) 984-6457

RIALTO
319321 W. Foothill Blvd.
(909) 421-2617

Riverside County

CORONA
1307 W. Sixth St.
(951) 272-1910

LAKE ELSINORE
2407 E. Lakeshore Dr.
(951) 471-4145

MORENO VALLEY
23301 Sunnymead Blvd.
(951) 601-2171

RIVERSIDE
9415 Mission Blvd.
(951) 360-3770

RIVERSIDE
1960 Chicago Ave.
(951) 781-2038

RIVERSIDE
7125 Indiana Ave.
(951) 686-6092

RIVERSIDE
2300 University Ave.
(951) 683-7760

RIVERSIDE
6115 Van Buren Blvd.
(951) 687-1008

San Diego County

NATIONAL CITY
924 Highland Ave.
(619) 477-9904

SAN DIEGO
4690 Market St.
(619) 264-4411

Open: Monday-Friday
7:30am-7:00pm
Saturday
8:00am-4:00pm

To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004
Sent: 10/15/2008 6:57:44 PM
Sent As: ECOM107@USPTO.GOV
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/340519

MARK: MOTHER'S

77340519

CORRESPONDENT ADDRESS:

ROD S. BERMAN
JEFFER MANGELS BUTLER & MARMARO
LLP
1900 AVENUE OF THE STARS FL 7
LOS ANGELES, CA 90067-4308

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: MOTHER'S NUTRITIONAL
CENTER, INC.

**CORRESPONDENT'S REFERENCE/DOCKET
NO:**

66309-1004

CORRESPONDENT E-MAIL ADDRESS:

trademarkdocket@jmbm.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 10/15/2008

This Office action is in response to applicant's communication filed on September 11, 2008.

The refusal to register the mark based on likelihood of confusion with the cited registrations is continued and maintained.

Applicant has provided statements concerning the nature of applicant's services. Specifically, applicant states that "[a]pplicant is the owner of a chain of groceries stores dedicated exclusively to women, infants

and children under the federally funded Women's, Infant and Children ("WIC") Program", and included a list of authorized foods under the program.

The following information requirement is imposed.

To permit proper examination of the application, applicant must submit additional information about the services. *See* 37 C.F.R. §2.61(b); *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1457-58 (TTAB 2004); TMEP §814. The requested information should include fact sheets, brochures, and/or advertisements.

The submitted factual information must make clear what the services are and how they are rendered, their salient features, and their prospective customers and channels of trade. Conclusory statements regarding the services will not satisfy this requirement for information.

Failure to respond to a request for information is an additional ground for refusing registration. *See In re DTI P'ship LLP*, 67 USPQ2d 1699, 1701-02 (TTAB 2003). Merely stating that information about the services is available on applicant's website is an inappropriate response to a request for additional information and is insufficient to make the relevant information of record. *See In re Planalytics*, 70 USPQ2d at 1457-58.

If applicant's services **exclusively** consist of the sale of foods authorized under the WIC Program, then applicant should amend the identification of services to so state, naming those foods specifically by category name. If the identification of services makes clear that the foods named in the cited registrations are not sold through applicant's services, the channels of trade may be different from the channels of trade through which the registrant's goods are sold. However, the applicant must submit information demonstrating the precise nature of the services.

/bluken/
Bonnie Luken
Trademark Examining Attorney
Law Office 107
Phone (571)272 8807
Fax (571)273 9107

RESPOND TO THIS ACTION: Applicant should file a response to this Office action online using the form at <http://www.uspto.gov/teas/eTEASpageD.htm>, waiting 48-72 hours if applicant received notification of the Office action via e-mail. For *technical* assistance with the form, please e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned examining attorney. **Do not respond to this Office action by e-mail; the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the

complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004
Sent: 10/15/2008 6:57:47 PM
Sent As: ECOM107@USPTO.GOV
Attachments:

IMPORTANT NOTICE
USPTO OFFICE ACTION HAS ISSUED ON 10/15/2008 FOR
APPLICATION SERIAL NO. 77340519

Please follow the instructions below to continue the prosecution of your application:

VIEW OFFICE ACTION: Click on this link
http://tmpportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77340519&doc_type=OOA&
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<http://tmpportal.uspto.gov/external/portal/tow> and enter the application serial number to access the
Office action.

PLEASE NOTE: The Office action may not be immediately available but will be viewable within 24 hours of this notification.

RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from 10/15/2008.

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WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the ABANDONMENT of your application.**

To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004
Sent: 5/7/2009 9:28:40 AM
Sent As: ECOM107@USPTO.GOV
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/340519

MARK: MOTHER'S

77340519

CORRESPONDENT ADDRESS:

ROD S. BERMAN
JEFFER MANGELS BUTLER &
MARMARO LLP
1900 AVENUE OF THE STARS FL 7
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GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: MOTHER'S NUTRITIONAL
CENTER, INC.

CORRESPONDENT'S REFERENCE/DOCKET
NO: 66309-1004

CORRESPONDENT E-MAIL ADDRESS:
trademarkdocket@jmbm.com

EXAMINER'S AMENDMENT

ISSUE/MAILING DATE: 5/7/2009

OFFICE SEARCH: The examining attorney has searched the Office's database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Section 2(d). 15 U.S.C. §1052(d); TMEP §704.02.

AMENDMENT: In accordance with the authorization granted by Mr. Rod Berman on May 6, 2009, the application has been AMENDED as indicated below. Please advise the undersigned examining attorney immediately if there is an objection to the amendment. Otherwise, no response is necessary. TMEP §707.

The identification of services is amended to read as follows: “Retail grocery stores that exclusively feature foods authorized for purchase by pregnant women, new mothers and young children participating in the federal Supplemental Food Program for Women, Infants and Children (WIC)” TMEP §1402.01(e).

If the identification of goods and/or services has been amended, please note that any future amendments must be in accordance with 37 C.F.R. §2.71(a) and TMEP §1402.07(e).

/bluken/
Bonnie Luken
Trademark Examining Attorney
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Phone (571)272 8807
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STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

To: MOTHER'S NUTRITIONAL CENTER, INC. (trademarkdocket@jmbm.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77340519 - MOTHER'S - 66309-1004
Sent: 5/7/2009 9:28:42 AM
Sent As: ECOM107@USPTO.GOV
Attachments:

IMPORTANT NOTICE
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APPLICATION SERIAL NO. 77340519

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(or copy and paste this URL into the address field of your browser), or visit
<http://tmportal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

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RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from 5/7/2009.

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WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the ABANDONMENT of your application.**



UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Ava Ruha Corp., dba)
Mother's Market & Kitchen)
Serial No. : 472,414) Law Office 6
Filed : March 26, 1984) March 20, 1985
For : MOTHER'S MARKET AND)
KITCHEN AND DESIGN)
TM Atty. : Martin H. Marks)

RESPONSE TO OFFICE ACTION

To the Honorable Commissioner
of Patents and Trademarks
Box 5
Washington, D.C. 20231

Dear Sir:

This is a response to the Office Action mailed February 14, 1984. Registration has been refused on the Principal Register because Applicant's proposed service mark so resembles the U.S. mark Registration No. 1,304,212 as to be likely to cause confusion or to cause mistake or to deceive. 15 U.S.C. 1052(d); TMEP 1205. Furthermore, it was contended that in light of co-pending applications, U.S. Serial No. 341,073; 195,989; and 195,990; Applicant's proposed service mark was likely to cause confusion. Applicant respectfully contends that "Mother's Market and Kitchen and Design" is not likely to cause confusion since the goods are not related nor so resemble the above-mentioned marks to be likely to cause confusion.

The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of the differences in the central characteristics of the goods or services and differences in the marks. Federated Foods vs. Fort Howard Paper Co., 192 U.S.P.Q. 24, 29 (CCPA 1976). Furthermore,

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the marks should consider the elements of a composite mark as a whole and not in a dissected or fragmented manner. The Estate of P.D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 538 (1920). Applicant respectfully contends that none of the marks cited as references by the Examiner would be likely to be confused with or cause confusion with Applicant's proposed mark so as to preclude registration on the Principal Register.

Applicant respectfully submits that the central characteristics of the services involved are distinctive and thus, Registrant's mark "Mama's Pizza" does not preclude registration of Applicant's proposed service mark under 1052(d). The services to be compared are those set forth in Applicant's service mark application vis-à-vis the services that are cited in Registrant's trademark certificate. Applicant's services are those involved in the fields of restaurant and grocery services directed toward the preparation and sale of "natural" food and health products. The specimens of record are a good indication of the particular products involved. With regards to the grocery business, Applicant's services include the retail sale of vitamins, minerals, organically grown vegetables and fruits, organic/herbal hair and skin care products, "natural" health food beverages (without preservatives, added sugars) and other such natural health products. There is no such service cited in Registrant's trademark certificate.

In addition, applicant's restaurant services are not the same as Registrant's. Applicant's services are restricted to the preparation and serving of natural

and health food products. "Mama's Pizza" is an Italian restaurateur. In contrast, Applicant does not present itself as specializing in Italian food nor does it in fact. Thus, even though the services superficially appear similar, Applicant respectfully submits that upon closer analysis, the services offered by the respective parties are distinctive. Mother's Restaurants Inc. vs. Mother's Bakery, Inc., 498 F.Supp. 847; 210 U.S.P.Q. 207 (W.D. N.Y. 1980).

In comparing the two marks, the Applicant respectfully submits that the general overall commercial impression created in the minds of the consumer after viewing Applicant's mark is such that those familiar with "Mama's Pizza" restaurants would not, upon coming into contact with "Mother's Market and Kitchen" natural foods store and restaurant, be likely to believe that the two enterprises were somehow related as to ownership or that they otherwise share a common sponsorship or origin. In determining whether or not the marks are similar, the respective marks must be considered in their entireties. Words or portions of words do not always dominate over design features. The issue turns on the facts of each individual case. See In re Elbaum, 211 U.S.P.Q. 639 (TTAB 1981); Boise Cascade Corp. vs. Mississippi Pine Manufacturers Association, 164 U.S.P.Q. 364 (TTAB 1969). Applicant respectfully contends that the design element of Applicant's mark, is a dominant or co-dominant portion thereof. Being dominant, it should be given greater force and consideration than other parts of the mark in resolving the question of confusing similarity between it

and another mark. The circle design filled with a steaming pot and fresh fruits is visually the most prominent feature of Applicant's mark and, by reason thereof, may well be a feature that sticks in the purchasing public's mind. Applicant respectfully submits that the present case is not one where the design is a literal translation of the word element of the mark nor is it a case where the design is merely a background upon which the word element of the mark is placed. As a result, Applicant respectfully submits that the design element of the mark sufficiently distinguishes Applicant's proposed mark to allow registration on the Principal Register.

Furthermore, it is respectfully submitted that the differences in the composite marks are further indicia of the services' distinctiveness, refuting a 2(d) rejection. Thus, Applicant respectfully submits the inclusion of the terms "Market and Kitchen" and the design in Applicant's proposed service mark provide additional indicia of distinctiveness. For example, Mama's Pizza does not portray services that Applicant's mark does, i.e., grocery services. There is no indication that Registrant's outlets furnish a service provided by Applicant's "Market" section, more specifically, the sales of vitamins, minerals, organically grown fruits and vegetables, and other such items. The In re Norfolk Wallpaper, Inc., 216 U.S.P.Q. 903 (TTAB 1983). Furthermore, it is respectfully asserted that the general purchasing public would not consider Mama's Pizza as an equivalent to a natural health food restaurant. Finally,

Applicant respectfully asserts that the additional word "Pizza" in Registrant's mark sounds and looks different from "Market and Kitchen", further supporting a finding of sufficient distinctiveness. Applicant respectfully asserts, therefore, that comparing the respective composite marks does not give any indication of similar goods and services.

Furthermore, Applicant respectfully contends that marks containing the term or feature that has been registered for the same or closely related goods or services should be more readily available to distinguishing scrutiny because the remaining portions of the marks have been deemed sufficient to distinguish the mark as a whole from one another. In re Hamilton Bank, 222 U.S.P.Q. 174 (TTAB 1984). It is clear from the pending applications and the present registration that the term "Mother's" or "Mama's" is widely used in the field of restaurant services. This is probably because "Mother's" is suggestive of a desirable characteristic since the term "Mother" has a close and intimate relationship with the preparation and servicing of food. It is a word filled with much symbolic importance, and it is no doubt exploited so frequently because of the impression it imparts of a connection to the values of motherhood, home and family. In the present case, the use of the other terms, "Market and Kitchen" provide additional indicia of separate source or origin in a crowded field. Furthermore, the addition of an arbitrary or fanciful design further distinguish between Applicant's and Registrant's marks. Furthermore, it might be contended

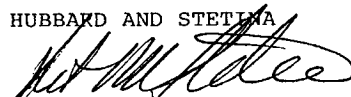
that the trail of fruits and vegetables in the particular design is suggestive of services of Applicant's since Applicant's services are those of natural foods and other health products. In conclusion, Applicant respectfully submits that the overall commercial impression of the two marks is such that one familiar with Registrant's services coming into contact with Applicant's services would not be likely to believe that they were somehow related as to ownership or that they otherwise shared a common sponsorship or origin.

In conclusion, Applicant respectfully submits that there is no relationship between the goods, services of the parties and/or circumstances or "conditions surrounding their sale" that could give rise to confusion.

The types of goods and services are not similar nor are the marks themselves so similar in a composite sense. Applicant respectfully submits that the term "Mother's Kitchen and Market and Design" is not so similar to Registrant's mark as to cause likelihood of confusion, to cause mistake or to deceive. Applicant, therefore, respectfully requests a reconsideration of the subject application and its subsequent allowance.

Respectfully submitted,

HUBBARD AND STETINA


KIT M. STETINA
Registration No. 29,445
24221 Calle De La Louisa
Suite 401
Laguna Hills, CA 92653
(714) 855-1246

RTI/sb/dm

THE BLUEBERRY COUNTRY

Pray

All communications respecting
this case should identify it by
number and names of parties.



Paper No.

**U.S. DEPARTMENT OF COMMERCE
Patent and Trademark Office**

Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

● Grant L. Hubbard, Kit M.
Stetina and John H. Lynn
c/o Hubbard, Stetina & Brunda
24221 Calle de la Louisa
Suite 401
Laguna Hills, CA 92653

● In re Ava Ruha Corporation
Serial No. 472,414
Filed: March 26, 1984

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PAT. & T. M. OFFICE

#10

Applicant's brief filed February 24, 1986, with
a certificate of mailing dated February 21, 1986, is
forwarded herewith to the Trademark Examining Attorney
for his brief in accordance with Trademark Rule 2.142(b).

Emma F. Brown
Administrator,
Trademark Trial and
Appeal Board



PAT. & T.M. OFFICE

FEB 28 1986

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL

Applicant : AVA RUHA CORPORATION)
Serial No.: 472,414) Law Office 6
Filed : March 26, 1984)
For : The mark MOTHER'S MARKET)
AND KITCHEN WITH DESIGN)
TM Atty : Martin H. Marks)

TRANSMITTAL LETTER

To the Honorable Commissioner
of Patents and Trademarks
Washington, D.C. 20231

Att: TTAB

Dear Sir:

Enclosed for filing is an Appellant's Brief on
Ex-Parte Appeal. You are hereby authorized to charge any
filing fees due in relation to this matter to Deposit
Account 19-4330. A duplicate copy of this Transmittal
Letter is enclosed for your purposes.

Respectfully submitted,

HUBBARD, STETINA & BRUNDA

KIT M. STETINA
KIT M. STETINA
Registration No. 29,445
24221 Calle de la Louisa
Suite 401
Laguna Hills, CA 92653
(714) 855-1246

/dm

#9
I hereby certify that this correspondence is being
deposited with the United States Postal Service as
first class mail in an envelope addressed to:
Commissioner of Patents and Trademarks, Washing-
ton, D.C. 20231 - 2/21/86
KIT M. STETINA 2/21/86
Kit M. Stetina, Reg. No. 29,445 DATE



TMT

- 1 -

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL

Applicant	: AVA RUHA CORPORATION)	
Trademark	: MOTHER'S MARKET AND KITCHEN WITH DESIGN)	Law Office 6
Serial No.	: 472,414)	
Filed	: March 26, 1984)	I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to:
TM Atty	: Martin H. Marks)	Commissioner of Patents and Trademarks, Washing-
)	ton, D.C. 20231, on 2/21/86
)	<i>K. M. Statina</i> 2/21/86
)	Kit M. Statina, Reg. No. 29,445 DATE

APPELLANT'S BRIEF ON EX-PARTE APPEAL

Statement of Facts

Appellant seeks registration of the service mark **MOTHER'S MARKET AND KITCHEN WITH DESIGN** for restaurant and grocery services directed toward natural and health products and food preparations on the Principal Register pursuant to 15 U.S.C. 1051. A copy of Appellant's mark is attached hereto as Exhibit A. Appellant is appealing the Final Office Action of the Examiner rendered on July 3, 1985. An oral hearing is not requested.

Registration has been refused under Section 2d of the act in light of Registration No. 1,304,212 for **MAMA'S PIZZA** and three applications, i.e., Application Serial No. 341,073 for **MOTHER'S** (with design); Serial No. 195,989 for **MOTHER'S** (with design) (hereinafter "**MOTHER'S LOGO**"); and Serial No. 195,990 for **MOTHER'S PIZZA PARLOR AND SPAGHETTI HOUSE** (with design). The latter three marks are commonly owned.

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The references cited by the examining attorney are marks that have had a tortious interrelationship, with a history of litigation between their owners.

The owners of the mark **MAMA'S PIZZA** have successfully opposed registration of the '073 application for **MOTHER'S** (with design), applied to restaurant services

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featuring Italian style foods. The MAMA'S PIZZA mark is also believed to be the basis for refusal to register the '989 MOTHER'S LOGO. The basis for the refusal to register the '990 application for MOTHER'S PIZZA PARLOR AND SPAGHETTI HOUSE, with design is not known. In a proceeding between the owners of the cited marks, the Texas State Court concluded that the MAMA'S PIZZA mark had been in prior usage, but that there was no likelihood of confusion between the mark MOTHER'S PIZZA PARLOR AND SPAGHETTI HOUSE, with design, and the MAMA'S PIZZA mark. In a separate proceeding, now final, the MOTHER'S PIZZA PARLOR mark was canceled in view of prior usage of the mark MAMA'S PIZZA. In yet another proceeding, the '073 application to register the mark MOTHER'S, with design, was successfully opposed.

The history of these MOTHER'S marks, either as applied to Italian foods or including additional expressions associating the mark to Italian foods, is not believed to be determinative of the merits of the present application. Procedurally, that history is believed to have potentially removed the '073' application for MOTHER'S, with design, as a reference insofar as that application is believed to have gone abandoned after the opposition by the present Opposer was sustained. Depending on the status of the '990 and '989 applications, it is believed that they may also have gone abandoned and therefore are improper references against the present application.

Substantively, the interrelationship of the marks cited in support of the present refusal to register is believed to have little impact on determination of the present proceeding in view of the substantial differences between Appellant's present mark and those involved in the prior or ongoing proceedings. Likelihood of confusion was found in one instance and not found in another. In any case, it is clear that Appellant's mark is decidedly

different in overall impression from any of the cited references. As set forth more fully below, it is also clear that there are many other MOTHER'S marks, for foods and restaurant services. A review of the TRADEMARKSCAN data base indicates that there are 355 cited marks including the term MOTHER, plus derivatives (the MOTHER'S marks). Of the 355 MOTHER marks, ninety-four (94) of those marks are classified for foods and ingredients of foods. Forty-five (45) are classified for miscellaneous services, including restaurant services.

I. ARGUMENT

The factors for gaging a likelihood of confusion are well established. The relevant factors include: the relationship between the goods or services, similarity of the marks in sounds, appearance or meaning, marketing channels used, and likely degree of purchaser care. In relation to the cited references, consumers of the services specified in the present application are unlikely to believe that the Appellant is the same source as the source of services provided under the cited marks. Indeed, the goods and services provided under Appellant's mark MOTHER'S MARKET AND KITCHEN, with design, are believed to be inherently limited by the nature of the mark and the specified services to specific classes of purchasers, i.e., to the sale of natural and health food products. That inherent limitation is emphasized by Appellant's design which emphasizes Appellant's relationship with such natural and health food products. The overall impression of Appellant's mark is believed to be substantially different than marks including reference to PIZZA or Italian specialty foods.

II. THERE IS NO LIKELIHOOD OF CONFUSION
BETWEEN APPELLANT'S MARK AND THE CITED REFERENCES

A. Commonality Between Appellant's Mark and the
Cited References is Limited to Use of the Common Term
MOTHER'S.

Appellant's mark, MOTHER'S KITCHEN AND RESTAURANT, with design, is common with the cited references solely in the use of the word MOTHER'S. The term MOTHER'S is a common word and is a weak trademark term. Surefit Products Co., 117 U.S.P.Q. 295 (CCPA 1958). Numerous third party uses of the same or similar mark precludes a broad scope of protection. Techtronix, Inc. v. Daktronics, Inc., 189 U.S.P.Q. 693 (CCPA 1976); The Condensast Publications, Inc. v. Miss Quality, Inc., 184 U.S.P.Q. 422 (CCPA 1970); and also AMF, Inc. v. American Leisure Products, Inc., 177 U.S.P.Q. 268 (CCPA 1963). Limited trademark significance of the term MOTHER'S was pointed out by the District Court in Mother's Restaurants, Inc. v. Mother's Bakery, Inc. wherein the Court stated:

"When considered as a mark by itself, "Mother's, first of all is a very commonly used word. Although the fact that a word is commonly used is not determinative of whether or not it may have become a trademark, its use in connection with the services in question necessarily must be distinctive. Mother's Restaurants, Inc. v. Mother's Bakery, Inc., 210 U.S.P.Q. 207 (D.C.N.Y. 1980)."

citing Purex Corporation, Ltd. v. The Maryland Paper Products, Co., 287 F.2d 186, 188, 229 U.S.P.Q. 59, 60-61 (C.C.P.A. 1961). The Court in Mother's Restaurants concluded that there as no likelihood of confusion between the marks MOTHER'S BAKERY and MOTHER'S PIZZA PARLOR. It is believed that the term MOTHER'S is a commonly used term and should not be subject to exclusive appropriation as applied to restaurant services.

None of the cited references incorporate the terms "Market" or "Kitchen". However, the terms "Market", "Kitchen", "Pantry", and other terms are contained in numerous other coexisting registrations, including a number of registrations for marks as applied to restaurant

and food services. A fraction of other coexisting **MOTHER'S** marks is appended hereto as Exhibit "B".

None of the cited references include a design that portrays any kind of object whatsoever, no less a portrayal of a particular combination of natural foods and cooking utensils, as included in Appellant's mark.

None of the cited references include a stylized form of lettering similar to that utilized by Appellant. The cited references utilize block print or late nineteenth century style printing to depict the written terms of the mark. In comparison, Appellant's mark utilizes a fanciful design that creates a distinct commercial impression from that provided by the references.

B. Appellant's Specified Services Further Distinguish Appellant's Mark from the Cited References.

Appellant's services are specified as: restaurant and grocery services directed toward natural and health products and food preparations. In comparison to the cited references, the application for registration of the **MOTHER'S LOGO** is directed to restaurant services and particularly, Italian foods, while the application for the mark **MOTHER'S PIZZA AND SPAGHETTI PARLOR** and the **MOTHER'S LOGO** specify restaurant services.

In relation to the **MOTHER'S** registration, the recitation of services comprises restaurant services which are distinguishable from the services set forth in the present application. Clearly Italian establishments specializing in the preparation of Italian foods typically have a menu, decor and ambiance distinct from that typically found in health food restaurants. It is unlikely that a consumer of health food services would expect to find those services in a pizza parlor and that one seeking to order a pizza would seek out a health food store. Consequently, Appellant's specified services are believed to provide further evidence of distinctiveness in

relation to the services set forth in the **MOTHER'S** with design application.

Appellant's specified services are also believed to form the basis for distinctions in relation to the other cited references wherein limitations on the services likely to be offered under those marks in inherently limited by the traditional terms included in the mark. It is believed that an ordinary patron of restaurants operating under the terms **MOMMA'S PIZZA** or **MOTHER'S PIZZA AND SPAGHETTI PARLOR** would likely believe those restaurants to be offering certain types of Italian foods and not the types of food products typically offered at health food stores. Consequently, it is believed that the **MOMMA'S PIZZA** and **MOTHER'S PIZZA AND SPAGHETTI PARLOR** are more likely to be confused with other **MOTHER'S** marks specifying Italian food services or products, than with **MOTHER'S** marks that do not include such a connection with Italian cuisine. Those same referenced marks are believed to be even less likely to be confused with other **MOTHER'S** marks that specifically evoke a different culinary suggestion, such as a connection with natural food products. Put another way, the ordinary consuming public is not likely to confuse a restaurant serving Tofu with one serving Tortellini.

Additionally, it is believed to be unlikely that a restaurant operating with the terms **MOMMA'S PIZZA** or **MOTHER'S PIZZA AND SPAGHETTI PARLOR** would be likely to be confused with Appellant's market that further sells unprepared natural foods and groceries.

Moreover, in view of the large number of other **MOTHER'S** marks for food products or restaurant services, the suggestion that a **MOTHER'S** mark having an inherent connection with a particular cuisine should dominate the entire range of **MOTHER'S** marks for restaurant services and food products simply ignores the overwhelming fact that the cited marks are but a few of many **MOTHER'S** marks

related to restaurant services and food products.

**III. APPELLANT'S MARK IS DISTINGUISHABLE FROM
MOMMA'S PIZZA.**

Appellant's mark, MOTHER'S KITCHEN AND MARKET, with design, is strikingly different in appearance from the MOMMA'S PIZZA mark. There are no common words between the two marks or common sounds in the terms in the respective marks. Unlike the other cited references, the MOMMA'S PIZZA mark fails to even have commonality with respect to the word MOTHER'S. Insofar as it is clear that no one entity has across the board rights for the term MOTHER'S, with any design, as applied to foods and restaurant services, certainly the term MOMMA'S is even less entitled to preclude all competing uses of the term MOTHER'S, as applied to restaurant services. This is believed to be especially true where, as here, the mark MOMMA'S is accompanied by the term PIZZA. The term PIZZA is believed to suggest food services that are quite distinct from the health food products and services specified in the present application. Consumers of Appellant's health food products and services are believed to be likely to exercise a greater degree of care in selection of the food products and services which they consume and that care is likely to further reduce the likelihood for confusion among the consuming public. Consequently, the visual, phonetic, and suggestive differences between Appellant's mark and MOMMA'S PIZZA are believed to be more than sufficient to avoid confusion in the marketplace when applied to the respective services.

**IV. APPELLANT'S MARK IS DISTINGUISHABLE FROM
THE MOTHER'S PIZZA AND SPAGHETTI PARLOR.**

Again, Appellant's mark is distinct from this reference in relation to appearance, sound and suggestivity. The aforementioned inherent connection between the reference marks and a specific type of food services is even greater in connection with this

reference. The mark MOTHER'S PIZZA AND SPAGHETTI PARLOR includes not only the terms PIZZA, but also SPAGHETTI PARLOR which are believed to further emphasize the connection between the reference mark and Italian cuisine. Although Italian cuisine may well be healthful in certain regards, an Italian restaurant is simply not typically viewed as a health food store. The degree of care exercised by health food consumers is believed to be a further factor militating against a finding of likelihood of confusion between Appellant's mark and this reference.

V. APPELLANT'S MARK IS DISTINGUISHABLE FROM THE MOTHER'S LOGO.

Appellant's mark is significantly different in appearance from the MOTHER'S LOGO. The MOTHER'S LOGO includes no illustration and omits the terms MARKET and KITCHEN. The style of writing of the common word MOTHER'S is substantially different. The overall commercial impact and suggestive quality of the mark are believed to be sufficiently different to avoid any likelihood of confusion between Appellant's mark and the MOTHER'S LOGO.

VI. APPELLANT'S MARK IS DISTINGUISHABLE FROM THE MOTHER'S MARK WITH DESIGN.

Again, Appellant's mark is substantially different in style and appearance, style of writing, inclusion of additional illustration and overall suggestive quality from that of this reference. As previously indicated there are a number of MOTHER'S marks applied to restaurant services and food products, as set forth in the appended list. In view of those coexisting marks, the distinctiveness of this reference is believed to be predicated upon the particular design selected and should not be considered to preempt use of the term MOTHER'S in conjunction with other terms and different designs within the restaurant services classification.

VII. CONCLUSION.

It is respectfully submitted that the

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Examining Attorney's refusal to register is without merit and cannot be sustained. The substantial differences in Appellant's mark and services to those cited marks eliminates any likelihood of confusion to consumers in the marketplace. Accordingly, reversal of the refusal to register Appellant's mark is respectfully requested.

Dated: 2/21/86

By: 

Respectfully submitted,
HUBBARD, STETINA & BRUNDA

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BBB/dm/kb

EXHIBIT "A"

AVA RUHA CORPORATION,
APPLICANT— d/b/a MOTHER'S MARKET AND KITCHEN
P.O. ADDRESS— 225 East 17th Street, Costa Mesa, CA 92627
DATE OF FIRST USE— May 1, 1978 **COMMERCE**— May 1, 1978
GOODS or SERVICES—RESTAURANT AND GROCERY SERVICES DIRECTED
TOWARD NATURAL AND HEALTH PRODUCTS AND
FOOD PREPARATIONS



- 1 -

Exhibit "B"
APPENDIX
Partial List of TRADEMARKSCAN Cited References

<u>Serial No.</u>	<u>Mark</u>	<u>Goods or Services</u>
1,577,298	Mother Wonderful	Foods and Ingredients of Foods
1,560,440	Mother's	Drinking Glasses
1,560,310	Mother's	Ceramic Mugs
1,547,035	Motherlode Dessert Parlor and Cafe	Restaurant Services
1,515,689	Uno Ma's	Softdrinks
1,506,099	Mother Nature's Vitamin Grove	Vitamins
1,489,943	Mother Nature's Bug Killer	Insecticides
1,489,732	Mother's Flash Wax	Automobile Shampoos
1,487,492	The Kind That Mother Used to Make, and design	Softdrinks
1,479,056	Mother Hubbard's Homemade Cookies Real Ice Cream, and design	Food and Restaurant Services
1,452,583	Mother's Goods	Cookies
820,681 (Supp)	Mother Goldstein	Wine
819,995 (Supp)	Less Work for Mother	Cooked Meats
819,489 (Supp)	Young Mother	Clothing
807,146 (Published)	Mother Earth, and design	Tortilla Chips
793,617	Mother's Bakery Wagon Cookies, and design	Cookies

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<u>Serial No.</u>	<u>Mark</u>	<u>Goods and Services</u>
718,051	Mom's Pizza	Operation of Takeout Food Restaurants
699,569	Mother's Natural Pet Food, and design	Pet Food Store Services
687,120	Mama Gina, and design	Restaurant Services
686,799	Mother Tucker's Steaks - Prime Rib - Seafood, and design	Restaurant Services
686,798	Mother Tucker's Steaks Prime Rib Seafood, and design	Restaurant Services
686,797	Mother Tucker's Steaks - Prime Rib - Seafood, and design	Restaurant Services
686,098	Mother Culpepper's	Restaurant Services
685,462	Mother Fletchers	Nightclub Services
681,926	Mother Culpepper's	Restaurant Services
681,912	Mother Culpepper's Barbecue & Fixin's, and design	Restaurant Services
674,724	"Ma" Glockner's, and design	Restaurant Services
674,570	There is No Other Quite Like Mother's	Restaurant Services
674,568	Mother's & Father's, and design	Restaurant Services
672,862	Your Mother's Kitchen, and design	Restaurant Services

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<u>Serial No.</u>	<u>Mark</u>	<u>Goods and Services</u>
671,449	Come on Home to Mother's	Restaurant Services
670,842	Mother Tucker's Food Experience, and design	Restaurant Services
669,338	Mother's, My Friends and Me	Restaurant Services
667,691	Mother's Pantry	Restaurant Services
667,687	Mother Nature	Restaurant Services
666,722	Mother Nature's	Restaurant and Bar Services
664,503	Mother Tucker's Food Experience	Restaurant Services
664,502	Mother Tucker's Food Experience, and design	Restaurant Services
664,222	The Jewish Mother	Restaurant Services
663,591 (Opposed)	Mother's Other Kitchen	Restaurant Services
657,558	Mother's	Cabaret Services
657,490	Mother Butler Pies, and design	Restaurant Services
593,828	Mother Goldstein	Wines & Spirits
593,726	Mother Vineyard	Wines
592,638	The Mother Grain	Natural Agricultural Products
589,816	Mother's Maid, and design	Processed Fruit
589,404	Mother Nature's Goodies, Inc., and design	Food Products

<u>Serial No.</u>	<u>Mark</u>	<u>Goods and Services</u>
586,134	Mother's Mountain Mustard, and design	Prepared Mustard
581,869	Ma Maid	Preserved Fruits
580,575	Mother's	Candied Peanuts
580,461	Mother's Milk	Herb Tea
578,342	Mother Nature	Canned Mushrooms
577,510	Mother Fukker's Peanuts	Packaged Peanuts
576,967	Mother's, and design	Cereal
576,966	Mother's	Cereal
574,215	Mother Nature's	Snack Foods
574,091	Mother Nature's	Animal Food
573,857	Mother Wheatleys	Cookies
573,674	Mother Lode	Coffee
572,255	Mother Klein's	Pet Food
572,040	Mother Nature's	Processed Nuts
571,949	Mother's Own	Vegetable Soup Mix
562,533	Mother Murphy's	Extracts Flavorings
562,410	Mother Made	Bread
554,427	Mother's and design	Cookies
554,426	Mother's and design	Cookies
554,302	Mother's	Gefilte Fish, Borscht, etc.
554,221	Mother's Choice	Canned Veggies.
553,179	Mother's Whimsies	Cookies

- 5 -		
<u>Serial No.</u>	<u>Mark</u>	<u>Goods and Services</u>
552,998	Mother's Pride and design	Cookies
551,295	Mother's	Alimentary Pastes
550,785	Mother Hen's	Cooked Chicken
549,953	Mother Parkers	Bakery Products
549,663	Mother's Best	Wheat Flour
547,727	Mother's and design	Pickles, etc.
546,790	Mother Earth	Canned Mushrooms
546,637	Mother's Best	Wheat Flour
546,375	Mother's Pantry	Molasses Syrup, etc.
546,261	Mother and design	Fresh Fruits
545,629	Mother Goose	Smoked Liver- sausage
545,291	Mother's Pride	Wheat Flour
545,035	Mother's and design	Schav (a beverage)
544,872	Mother's	Cookies and Cakes
544,330	Mother's and design	Mayonnaise and Salad Dressing
544,227	Mother Hubbard	Wheat Flour
544,154	Mother's and design	Oleo Margerine
543,484	Mother's and design	Oleo Margerine
543,431	Mother's and design	Sauerkraut
543,332	Mother's and design	Sweet Pickled Pimientos
543,222	Mother's and design	Sweet Peppers, etc.

<u>Serial No.</u>	<u>Mark</u>	<u>Goods and Services</u>
542,684	Mother's Best	Wheat Flour
542,053	Mother's	Oatmeal, etc.
541,836	Mother's and design	Borscht
541,760	Mother's and design	Sweet and Sour Fish
541,317	Mother's Delight	Canned Tomatoes, etc.
541,312	Mother's	Cookies
536,626	Mother Ann	Salt Cod Fish
536,410	Mother's	Crushed Oats
536,185	Mother's and design	Noodles
535,910	Mother Goose	Biscuits
535,839	Mother's and design	Macaroni
535,865	Mother Hubbard and design	Wheat Flour
535,689	Mother's	Cornmeal
532,146	Mother's Pride	Softdrinks
531,911	Mother Goose	Beverage Flavorings
279,305	Mama Martinelli's	Pizza Baking Kits
209,123	Like Mother's	Toy Tea and Cooking Sets

1. The first part of the document is a list of the names of the persons who have been appointed to the various positions of the Board of Directors of the Corporation.



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TRADEMARK TRIAL
AND APPEAL BOARD

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Applicant :	Ava Ruha Corporation)	
Serial No.:	472,414)	Law Office 6
Filed :	March 26, 1984)	Applicant's
)	Reply Brief
For :	MOTHER'S MARKET & KITCHEN & DESIGN)	
Examining)	
Attorney :	Martin H. Hicks)	

THE EXAMINING ATTORNEY IMPROPERLY DISREGARDS NUMEROUS FEATURES
OF APPLICANT'S MARK, COMPARING ONLY THE TERM MOTHER'S
TO THE CITED REFERENCE

The Examining Attorney's brief appears to start and finish with an acknowledgement that in determining questions of confusingly similarity between the marks, the marks must be considered in their entirety. However, from there the Examining Attorney proceeds to disregard that principal, concluding that the term MOTHER'S is the dominant portion of the applicant's mark and that the remaining portions are individually either descriptive or fail to have any distinctive quality.

In the course of the Examining Attorney's brief he concludes that the term MOTHER'S dominates applicant's mark; that the term MARKET and KITCHEN is descriptive; and declines to attribute any

significance to those terms even in combination with the remainder of Applicant's mark.

Moreover, apparent recognition of the fact that Applicant's design portrays a significant type of food service, the Examining Attorney concludes that Applicant's design is the "equivalent of 'health food'". However, rather than relying upon that vivid imagery to emphasize the overall distinctiveness of Applicant's mark, or the service associated with Applicant's mark, the Examining Attorney dismisses that portion of Applicant's mark as subordinate and descriptive in the same manner which he dismisses the terms MARKET and KITCHEN. Moreover, aside from ignoring the impact of Applicant's design on the overall distinctiveness of the mark the Examining Attorney's conclusion that Applicant's design is decriptive is without any support in the prosecution record in this case.

THE HOLDING OF THE BOARD IN STANDARD BRANDS IS DISTINGUISHABLE
FROM THE SITUATION PRESENT IN THIS CASE

In support of the limited comparison made by the Examiner between Applicant's mark and the cited reference, the Examiner cites the opinion in Standards Brands, Inc., v. RJR Foods, Inc., 192 USPQ 383 (TTAB 1976). In the present case, Applicant's mark MOTHER'S

MARKET & KITCHEN, with design must be considered in relation to the cited reference for MAMA'S PIZZA, with no design. The Standard Brands case involved the marks CHERRY ROYAL and ROYAL. Neither mark incorporated a design, as does Applicant's mark. Moreover, words included in the Registrant's mark, CHERRY ROYAL, were wholly incorporated into Applicant's mark ROYAL, in addition, both Applicant and Registrant in that case used the marks on the same specific goods, i.e. fruit flavored beverages.

In Applicant's mark, the design dominants, or co-dominants the overall mark and distances Applicant's mark from any association with Registrant's mark. Moreover, there is no commonalty in words. In view of the vast numbers of MAMA'S and MOTHER'S marks it is believed to be unlikely that either one should provide exclusivity with respect to the use of the other. The words beyond MAMA'S and MOTHER'S are believed to further distinguish the two marks in that one refers to a market and kitchen and the other refers to a particular food product. Thus, regardless whether the services are viewed as distinct, the marks themselves are believed to incorporate distinguishing factors.

Despite the fact that the mark MAMA'S PIZZA is registered for restauraunt services, the nature of the mark itself is believed

to suggest to consumers a more limited category. Therefore, while the mark is literally registered for a broad class of restaurant services, a likelihood of confusion is believed to be less where, as here, Applicant's mark is used in a more limited area which is inconsistent with a descriptive aspects of Registrant's mark. The Examining Attorney's argument that health foods include natural Italian foods (page 13) seeks to equate pizzerias with health food stores, and thus is believed to ignore distinctions that are appreciated by ordinary consumers. Though market distinctions related to the specified services are not relied upon as a sole basis for Applicant's argument that confusion is unlikely, those differences, when combined with differences and words and designs accompanying Applicant's mark are believed to be more than sufficient to dispell any confusing similarity.

Having disposed of the term MARKET & KITCHEN as descriptive, the lettering style as non-distinctive ornament, the design as descriptive, and the services as non-distinguishable, the Examining Attorney simplifies the questions of registerablility to whether the term MAMA'S is confusingly similar to MOTHER'S. Concluding that those terms mean the same thing, the Examining Attoreny concludes that there is significant likelihood of confusion to

preclude registration. In reaching that conclusion, the Examining Attorney recites the salient elements of comparing appearance, sound and meaning in determining likelihood of confusion. However, in discharging all other portions of Applicant's mark, no such analysis is ever made with respect to of Applicant's mark in its entirety.

THE TERM MOTHER'S OR MAMA'S IS A COMMONLY USED WORD
ENTITLED TO A NARROW SCOPE OF EXCLUSIVITY

Even assuming the ultimate issue in this case is simply whether MOTHER'S and MAMA'S are confusingly similar, it is believed that those terms are so commonly used as to not be entitled to exclusive appropriation by any one entity.

The Examining Attorney attempt to distinguish the decision in MOTHER'S RESTAURANT, INC. v. THE MOTHER'S BAKERY, INC., 210 USPQ 207 (WDNY 1980), on several procedural and substantive grounds. In so doing, the Examining Attorney overlooks the principal relevance of that decision in its recognition wide common usage of the term MOTHER'S. The Examining Attorney does not contest the trial courts finding that the term MOTHER'S is a commonly used word (210 USPQ at 211-212) or that MOTHER'S imparts a connection to the values of motherhood home and family so as to

have little distinctive quality by itself (210 USPQ at 215). Those statements are believed to be uncontested by the Examining Attorney and capable of common notice. The Examining Attorney's attempt to distinguish MOTHER'S RESTAURANT, INC. v. MOTHER'S BAKERY and his objections to the examples of such common usage cited by Applicant in its Appeal Brief are believed to be a poor substitute for addressing the underlying issue regarding the distinctiveness of MOTHER'S by itself.

As exemplified in MOTHER'S RESTAURANT, INC. v. MOTHER'S BAKERY, supra, and in the trademarkscan search results, which are believed to be readily available to the Examining Attorney, the term MOTHER'S is a commonly used term. Rather than being merely descriptive surplusage to the dominant term MOTHER'S, the additional terms and designs incorporated with the various MOTHER'S marks serve to distinguish those marks from each other, even with the common field of restaurant services.

INFORMATION SUBMITTED WITH APPLICANT'S APPEAL BRIEF
IS ENTITLED TO BE CONSIDERED IN THIS APPEAL

By inclusion of lists of other registered marks with its Appeal Brief, Applicant does not seek the challenge of validity of the

cited reference, or to interject any issues into the precedeing that have not already been raised by Applicant. As previously indicated the Examiner has not contested the existence of numerous other MOTHER'S marks and therefore his objection to Appendix B of the Appeal Brief is believed to be more a matter of form than substance. Moreover, insofar as the Examiner has already indicated, is it that in his opinion the other MOTHER'S marks are irrelevant, it would appear to be an unnecessary and futile exercise to require Applicant to incur the expense introducing certified copies of such a large number of registrations only to receive the same response from the Examiner.

Applicant refers to those references simply to demonstrate what is believed to be the obvious adequacy of the Examining Attorney's position that registerability should be determined by the mere comparison of the term MOTHER'S and the term MAMA'S.

Notwithstanding Applicant's view that is unnecessary to reopen the prosecution to introduce additional evidence of such wide usage into this case should the Board see that procedure as necessary, Applicant respectfully invites the Board to remand for further proceedings. However, in Applicant's view the material

and argument already submitted, in conjunction with the commonly known facts already judicially noticed in other opinions including MOTHER'S RESTARAUNT, INC. v. MOTHER'S BAKERY, are adequate to support reversal of the Examining Attorney's refusal to register.

Respectfully submitted,

Date: May 27, 1986

By: Bruce B Brunda
BRUCE B. BRUNDA

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner of Patents and Trademarks, Washington, D.C. 20231 On

May 27, 1986

(Date of Deposit)

BRUCE B. BRUNDA REG. NO. 28,497

Name of applicant, assignee or
Registered Representative

Bruce B Brunda

Signature

May 27, 1986

Date of Signature

CERTIFICATE OF MAILING

CERTIFICATE OF MAILING

I hereby certify this correspondence and the identified enclosures are being deposited with the U.S. Postal Service as First Class mail, postage prepaid, in an envelope addressed to the Commissioner for Trademarks, P.O. Box 1450, Alexandria, VA 22313-1450 under 37 C.F.R. §1.10.

Dated: October 1, 2012




Esther Silverman

CERTIFICATE OF SERVICE

It is hereby certified that one (1) copy of the foregoing **RESPONDENT'S MOTION TO DISMISS PETITION TO CANCEL PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM** is being sent via U.S. mail to Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen's attorney of record as follows:

Stephen Z. Vegh
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, CA 92656

Dated: October 1, 2012



Esther Silverman